TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 183, 220.

THE AMERICAN EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

FRED A. MAYNARD, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, EX REL. GEORGE F. MOORE ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED FEBRUARY 21, 1899.

(17,308.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 723.

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vs.

FRED A. MAYNARD, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, EX REL. GEORGE F. MOORE ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

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1 (*Petition for Writ of Certiorari.*)

STATE OF MICHIGAN:

To the supreme court:

The petition of the American Express Company, which is a joint stock association, with its principal offices located in the city of New York (and is not organized as a corporation), respectfully shows that on the third day of August, 1898, an application was made to the circuit court for the county of Wayne jointly by several business houses of Detroit, in the name of the attorney general, against your petitioner, praying for the issuing of the writ of mandamus, to be directed to your petitioner, a copy of which application is hereto attached, marked "A."

That upon the filing of such application an order to show cause, directed and served upon your petitioner, was made by said court, of which order a copy is hereto attached, marked "B."

That on August 13, 1898, your petitioner filed its answer to said order to show cause, copy of which is hereto attached, marked "C."

That afterwards and on September 7th said matter came on for hearing before the Hon. R. E. Frazer, circuit court judge, and, no issue being demanded by the relators, the same was heard on petition and answer.

And thereafter and on September 21, 1898, the said circuit judge made an order in said matter, a copy of which is hereto attached, marked "D."

Your petitioner further shows and charges:

1. That the said circuit court had no jurisdiction to hear and determine said matter.

2. That said circuit court had no legal power to make the final order as shown by Exhibit D.

2 3. That under the facts set forth in the answer of your petitioner and legally admitted to be true by relators the court should have dismissed said applicatian with costs.

4. That your petitioner feeling itself aggrieved by the entry of said order, and its rights under the license granted it by this State being greatly injured and unlawfully infringed—

Your petitioner therefore prays that this court's writ of certiorari may issue to the said circuit court of the county of Wayne, commanding it to certify the records and proceedings in the above matter to this court, and that this court will reverse said order and will grant to your petitioner such other and further relief in the premises as law and justice shall require.

AMERICAN EXPRESS CO.,
By CHAS. F. REED, *Gen'l Ag't.*

WISNER & HARVEY,
Attorneys for Petitioner.
H. C. WISNER, *Of Counsel.*

STATE OF MICHIGAN, } ss:
County of Wayne, }

Chas. F. Reed, being duly sworn, says that he is the agent of the above-named petitioner and is authorized by it to make and does make this affidavit in its behalf; that he has read the foregoing petition and knows the contents thereof and is familiar with the facts therein, and the same are true as stated.

CHAS. F. REED.

Subscribed and sworn to this 23rd day of September, 1898.

LEWIS C. McBRIDE,
Notary Public, Wayne County, Michigan.

3 A.

The Circuit Court for the County of Wayne.

To the circuit court for the county of Wayne:

The petition of Fred A. Maynard, attorney general of the State of Michigan, at the relation of George F. Moore, Ransom Gillis, Charles Buncher, Frank S. Munger, Abram P. Sherrill, and James S. Meredith, as survivors of themselves and James L. Edson, deceased, composing the firm of Edson, Moore & Co.; Henry A. Krolik and Herman Krolik, composing the firm of A. Krolik & Co.; William H. Strong, James L. Lee, Hal W. Glover, and George R. Treble, composing the firm of Strong, Lee & Co.; James W. Fales and William J. Fales, composing the firm of J. W. Fales & Co.; James K. Burnham, Albert H. Munger, Frederick C. Stoepel, Joseph J. Crowley, and James Wilson, composing the firm of Burnham, Stoepel & Co., and the American Harrow Co., a body corporate, respectfully represents:

1. That the American Express Company, the respondent herein, is a joint stock association, organized and existing under the laws of the State of New York and having its principal business office located in the city of New York, in said State.

2. That said company is a common carrier, transacting the express business, so called, and is engaged in the business of receiving, carrying, forwarding, and delivering goods, wares, and merchandise, by express, for hire, on behalf of all persons who may see fit to require its services from point to point throughout the various States and Territories of the United States, and particularly from point to point in the State of Michigan.

3. That on the 29th day of January, A. D. 1897, said com-
4 pany had four hundred and eighty-nine (489) agencies or places of business in the State of Michigan alone, at which agencies or places of business said company received goods, wares, and merchandise in boxes, bales, packages, bundles, or otherwise for transmission and transporting for hire to various points in the State of Michigan and throughout the United State, and was then and still is a common carrier, holding itself out to the public as

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authorized to receive, carry, and deliver such boxes, bales, packages, or bundles, &c.

4. That the business of the said company was and is large and lucrative, and that by the annual report of said company filed in the office of the State treasurer of the State of Michigan on the 29th day of January, 1897, the said company then represented that its business was represented by one hundred and eighty thousand (180,000) shares, and that the working fund of the association was fixed at five million three hundred thousand dollars ($5,300,000), and that the amount of the gross receipts on their current business in the State of Michigan for the year ending December 31, 1896, was the sum of one hundred thirty thousand four hundred fifty-nine and $\frac{25}{100}$ dollars ($130,459.25), and that said statement represents substantially, as petitioner is informed and believes, the situation and condition of said company at the present time.

5. That chapter 103 of Howell's Statutes of the State of Michigan provides that it shall not be lawful for any person or persons to act within this State as agent or officer in transacting the express business or the forwarding of packages or parcels by express for any company, association, or individual without first procuring a certificate of authority or license from the State treasurer of this State, and before obtaining such certificate such company, association, individual, agent, or agents is required to furnish to the State
5 treasurer of the State of Michigan annually in the month of January in each year with a statement, under oath, of the president, treasurer, secretary, or general agent of such company, association, or individual, showing:

First. The name and locality of the company or association.

Second. The amount of its capital stock, and how much is paid upon such stock.

Third. The number of agencies or places of business of said company in this State.

Fourth. The amount of gross receipts on their current business in this State for the year ending December 31st, next preceding such report.

And the said express company, association, firm, corporation, or individual complying with the requirements of said act and receiving a certificate or license from the State treasurer of the State was and is by said act permitted to do business freely in any part of the State.

6. And your petitioner represents upon information and belief that the said American Express Company, respondent, has substantially complied with the terms and provisions of said act, and thereupon received a permit and license to do business in the State of Michigan, and in pursuance thereof is authorized to do business in said State, and to receive, accept, and transmit packages from point to point throughout the United States, and your petitioner represents that it is the duty of the said respondent to so receive, accept, and transmit said packages when duly offered or tendered to it for that purpose and the charges therefor paid or tendered.

THROUGH POOR COPY

7. That the business of said company is of a public or quasi public character, and a public function used and exercised by said company for the people at large throughout the State of
6 Michigan, as well as other States of the United States, and in which the public has a substantial interest, and the abuse or misuse of which is of a substantial nature.

8. That the persons at whose relation this proceeding is instituted by the attorney general of the State constitute a portion of the people of the State of Michigan and the public at large, and that the refusal of the respondent to receive, accept, and transmit goods, wares, and merchandise, as hereinafter more particularly stated and represented, constitutes but a few out of many cases of like character, and are presented for the purpose of representing the uniform course and practice of the respondent company.

9. Your petitioner further represents that on June 13, 1898, the Congress of the United States passed an act entitled "An act to provide ways and means to meet war expenditures and for other purposes," and that said act, among other things, provides:

"Express and freight: It shall be the duty of every railroad or steamboat company, carrier, express company or corporation, or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or persons from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk, or in boxes, bales, packages, bundles, or not so enclosed or included; and that there shall be duly attached and cancelled, as in this act provided, to each of said bills of lading, manifest or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: Provided, that but one bill of lading shall be required on bundles or packages of newspapers when enclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest or other memorandum, as herein provided, shall subject such railroad
7 or steamboat company, carrier, express company or corporation, or person, to a penalty of fifty dollars for each offense, and no such bill of lading, manifest or other memorandum shall be used in evidence, unless it shall be duly stamped as aforesaid."

10. That by reason of a desire of the respondent to avoid the payment of the stamp tax, so called, and to impose such obligation on the shipper, the respondent herein refuses to accept any goods for transportation unless such shipper attaches the stamp to the said bill of lading, manifest, or other evidence of receipt and forwarding for each shipment or furnishes the money and means for that purpose to the said company, and that the said company thereby not only avoids its duty under said act of Congress to pay and bear its proportion of the revenues to meet war expenditures, as provided by said act, but violates its duty as a common carrier to receive, accept, transport, and deliver such goods, wares, and merchandise so offered and tendered to it for that purpose, and in support thereof your petitioner represents:

(a.) That on the first day of July, A. D. 1898, the firm of Edson,

Moore & Co., as hereinbefore mentioned, presented, tendered, and offered a box, bale, package, bundle, or parcel to said express company for shipment and transportation, and that said company refused to receive, accept, ship, and transport the same or to issue to the said shipper a receipt therefor unless a stamp of the value of one cent was paid or provided by said Edson, Moore & Co.

(*b.*) That on the first day of July, A. D. 1898, the firm of A. Krolik & Co., as hereinbefore mentioned, presented, tendered, and offered a box, bale, package, bundle, or parcel to said express company for shipment and transportation, and that said company refused to receive, accept, ship, and transport the same or to issue to the said

8 shipper a receipt therefor unless a stamp of the value of one cent was paid or provided by said A. Krolik & Co.

(*c.*) That on the first day of July, A. D. 1898, the firm of Strong, Lee & Co., as hereinbefore mentioned, presented, tendered, and offered a box, bale, package, bundle, or parcel to said express company for shipment and transportation, and that said company refused to receive, accept, ship, and transport the same or to issue to the said shipper a receipt therefor unless a stamp of the value of one cent was paid or provided by said Strong, Lee & Co.

(*d.*) That on the second day of July, A. D. 1898, the firm of J. W. Fales & Co., as hereinbefore mentioned, presented, tendered, and offered a box, bale, package, bundle, or parcel to said express company for shipment and transportation, and that said company refused to receive, accept, ship, and transport the same or to issue to the said shipper a receipt therefor unless a stamp of the value of one cent was paid or provided by said J. W. Fales & Co.

(*e.*) That on the seventh day of July, A. D. 1897, the firm of Burnham, Stoepel & Co., as hereinbefore mentioned, presented, tendered, and offered a box, bale, package, bundle, or parcel to said express company for shipment and transportation, and that said company refused to receive, accept, ship, and transport the same or to issue to the said shipper a receipt therefor unless a stamp of the value of one cent was paid or provided by said Burnham, Stoepel & Co.

(*f.*) That on the 2nd day of August, A. D. 1898, the American Harrow Co., a body corporate, as hereinbefore mentioned, presented, tendered, and offered a box, bale, package, bundle, or parcel to said express company for shipment and transportation, and that said company refused to receipt, accept, ship, and transport the same or to issue to the said shipper a receipt therefor unless a stamp of the value of one cent was paid or provided by said American Harrow Co.

9 11. As before stated, your petitioner represents that the above and foregoing constitute but a few of many instances of like character, and that it is the uniform course and practice of the said respondent to refuse to receive, accept, transport, carry, and deliver such goods, wares, and merchandise in boxes, bales, packages, bundles, or otherwise unless the said stamp tax is paid or provided by said shipper.

12. Your petitioner represents that the said American Express Company, respondent herein, has substantially refused to discharge

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its duty as a common carrier and has, to a material degree, suspended the exercise of its functions and franchises by refusing to take goods, wares, and merchandise in boxes, packages, bales, parcels, &c., which have been offered and tendered to it at its places of business and agencies in the city of Detroit for transportation at the usual rates and upon the usual terms, and has refused to accept and transport a great part of the goods, wares, and merchandise duly offered and tendered to it except upon the consent of the shipper to pay the said stamp tax, so called, whereby great loss and damage has accrued to the people of the State, and the trade and commerce of the people of said State is greatly injured by the refusal and neglect of said respondent company to perform its duties of carrier unless the stamp tax, so called, is paid by the shippers and consignors so tendering such goods to said company.

Your petitioner therefore prays that a peremptory mandamus may issue to the said The American Express Company and Charles F. Reed, the local agent thereof, respondents, and to its officers, agents, and servants, commanding it and them to receive, accept, transmit, and deliver any and all goods, wares, and merchandise duly offered or tendered to it in boxes, bales, packages, or bundles or not so enclosed or included for transportation when the fees and charges for such goods are paid, offered, or tendered to said company, and to issue to the shippers and consignors throughout the State of Michigan or their agent or agents or persons from whom any such goods are received for transportation a bill of lading, manifest, or evidence of receipt or forwarding for each shipment received for carriage and transportation, with the stamp duly attached thereto and cancelled by it, as provided by the act of Congress hereinbefore mentioned, and without demanding or requiring of such consignors or shippers the said stamp or the value thereof.

FRED A. MAYNARD,
Attorney General of the State of Michigan.

WARNER, CODD & WARNER,
Attorneys for Petitioner.

STATE OF MICHIGAN, }
County of Wayne, } ss:

Fred A. Maynard, attorney general of the State of Michigan, being duly sworn, deposes and says that he has read the foregoing petition by him subscribed and knows the contents thereof, and that the same is true, as he verily believes.

FRED A. MAYNARD.

Subscribed and sworn to before me this 2nd day of August, A. D. 1898.

C. M. MATTHEWS,
Notary Public, Wayne County, Michigan.

11 STATE OF MICHIGAN, } ss:
County of Wayne, }

William H. Marshall, being duly sworn, deposes and says that on the first day of July, A. D. 1898, he presented, offered, and tendered to the American Express Company for shipment by it as a common carrier, in behalf of Edson, Moore & Co., a certain box or package addressed to Wm. Barie & Son, at Saginaw, E. S., Mich., and that the said express company refused to receive, accept, ship, and transport the said box or package unless a revenue stamp of the value of one cent was paid or provided by said Edson, Moore & Co. therefor.

WM. H. MARSHALL.

Subscribed and sworn to before me this 1st day of August, A. D. 1898.

SOL. J. GRONEMAUR,
Notary Public, Wayne County, Michigan.

12 STATE OF MICHIGAN, } ss:
County of Wayne, }

Geo. R. Treble, being duly sworn, deposes and says that on the first day of July, A. D. 1898, he presented, offered, and tendered to the American Express Company for shipment by it as a common carrier, in behalf of Strong, Lee & Co., a certain box or package addressed to Stanley D. Gray, at Coloma, Mich., and that the said express company refused to receive, accept, ship, and transport the said box or package unless a revenue stamp of the value of one cent was paid or provided by said Strong, Lee & Co. therefor.

GEORGE R. TREBLE.

Subscribed and sworn to before me this 1st day of August, A. D. 1898.

C. J. MORROW,
Notary Public, Wayne County, Michigan.

13 STATE OF MICHIGAN, } ss:
County of Wayne, }

Herman Krolik, being duly sworn, deposes and says that on the first day of July, A. D. 1898, he presented, offered, and tendered to the American Express Company for shipment by it as a common carrier, in behalf of A. Krolik & Co., a certain box or package addressed to the Huron Grindstone Co., at Port Austin, Mich., and that the said express company refused to receive, accept, ship, and transport the said box or package unless a revenue stamp of the value of one cent was paid or provided by said A. Krolik & Co. therefor.

HERMAN KROLIK.

Subscribed and sworn to before me this first day of August, A. D. 1898.

C. J. MORROW,
Notary Public, Wayne County, Michigan.

14 STATE OF MICHIGAN, } ss:
County of Wayne, }

James W. Fales, being duly sworn, deposes and says that on the 2nd day of July, A. D. 1898, he presented, offered, and tendered to the American Express Company for shipment by it as a common carrier, in behalf of J. W. Fales & Co., a certain box or package addressed to E. S. Clark, Greenville, M., and that the said express company refused to receive, accept, ship, and transport the said box or package unless a revenue stamp of the value of one cent was paid or provided by said J. W. Fales & Co. therefor.

JAMES W. FALES.

Subscribed and sworn to before me this first day of August, A. D. 1898.

F. M. ROBBINS,
Notary Public, Wayne County, Michigan.

15 STATE OF MICHIGAN, } ss:
County of Wayne, }

Joseph J. Crowley, being duly sworn, deposes and says that on the seventh day of July, A. D. 1898, he presented, offered, and tendered to the American Express Company for shipment by it as a common carrier, in behalf of Burnham, Stoepel & Co., a certain box or package addressed to D. & A. Cochrane, at Almont, Mich., and that the said express company refused to receive, accept, ship, and transport the said box or package unless a revenue stamp of the value of one cent. was paid or provided by said Burnham, Stoepel & Co. therefor.

JOSEPH J. CROWLEY.

Subscribed and sworn to before me this first day of August, A. D. 1898.

GEORGE A. CORWIN,
Notary Public, Wayne County, Michigan.

16 STATE OF MICHIGAN, } ss:
County of Wayne, }

Floyd G. Beach, being duly sworn, deposes and says that on the 2nd day of August, A. D. 1898, he presented, offered, and tendered to the American Express Company for shipment by it as a common carrier, in behalf of the American Harrow Co., a certain box or package addressed to C. E. Rick, at Indianapolis, Ind., and that the said express company refused to receive, accept, ship, and transport the said box or package unless a revenue stamp of the value of one cent was paid or provided by said American Harrow Co. therefor.

FLOYD G. BEACH.

Subscribed and sworn to before me this 2nd day of August, A. D. 1898.

C. M. MATTHEWS,
Notary Public, Wayne County, Michigan.

17 B.

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

FRED A. MAYNARD, Attorney General of the State of Michigan, at the Relation of George F. Moore, Ransom Gillis, Charles Buncher, Frank S. Munger, Abram P. Sherrill, James S. Meredith, Henry A. Krolik, Herman Krolik, William H. Strong, James L. Lee, Hal W. Glover, George R. Treble, James W. Fales, William J. Fales, James K. Burnham, Albert H. Munger, Frederick C. Stoepel, Joseph J. Crowley, James Wilson, and The American Harrow Company, a Body Corporate, Relators,

vs.

THE AMERICAN EXPRESS COMPANY, a Body Corporate, and Charles F. Reed, Respondents.

On reading and filing the petition of Fred A. Maynard, attorney general of the State of Michigan, at the relation of George F. Moore and others, relators, and the affidavits annexed thereto, and on motion of Warner, Codd & Warner, of counsel for said relators—

It is ordered that the American Express Company, a body corporate, and Charles F. Reed, local agent thereof, do show cause before this court on Monday, the 8th day of August, A. D. 1898, at nine o'clock in the forenoon of that day, why a peremptory mandamus should not be issued out of said court to compel them, the said American Express Company and said Charles F. Reed, the local agent thereof, to receive and accept for transportation and delivery any and all goods, wares, and merchandise offered or tendered to said express company, whether in boxes, bales, packages, or bundles or not so enclosed or included, as a common carrier from point to point upon its lines and to issue to shippers or consignors or their agents or person from whom any goods shall be delivered, as aforesaid, for transportation a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment re-

18 ceived for carriage and transportation, with a revenue stamp of the value of one cent duly attached thereto and cancelled, as provided by an act of Congress entitled "An act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898, and without requiring the payment of said stamp tax by such shipper, consignor, or his agent or other person from whom any goods are so delivered for transportation.

And it is further ordered that a copy of this order, together with a copy of the petition and affidavits upon which the same is founded, be served upon the said American Express Company four days before the time hereinabove limited for showing cause by delivering the same to said Charles F. Reed, the local agent thereof.

GEORGE S. HOSMER,
Circuit Judge.

19 C.

In the Circuit Court for the County of Wayne.

FRED A. MAYNARD, Attorney General, etc., on the Relation of George F. Moore, Ransom Gillis, Charles Buncher, Frank S. Munger, Abram P. Sherrill, and James S. Meredith, as Survivors of Themselves and James L. Edson, Deceased, Composing the Firm of Edson, Moore & Co., *et al.*

vs.

THE AMERICAN EXPRESS COMPANY.

The answer of The American Express Company, respondent, to the petition of the attorney general of the State of Michigan in the above-entitled cause and the order of this court commanding it to show cause on the eighth day of August instant why the prayer of said petition should not be granted respectfully shows:

1. That the allegations of fact in paragraphs 1, 2, 3, and 4 are true as stated, except that part of paragraph 4 which alleges that "the statement of respondent's business, as shown by its report filed with the State treasurer January 29th, 1897, represents the situation and condition at the present time," which respondent denies.

2. That the allegations in paragraphs 5, 6, 7, 8, and nine respondent admits to be true.

3. That as to paragraph 10 respondent does not admit its desire to avoid paying the stamp tax, so called, but submits that under the terms of said act of Congress, properly construed, it is not made respondent's duty to pay said tax, only when some party who would be a shipper mutually agrees with respondent to enter into the relation of shipper and carrier and said party has tendered for shipment some article to be carried by defendant, which it has accepted for that purpose, then, and only then, is respondent liable
20 under said act to provide and attach said stamp; that by requiring in the manner it does, as hereinafter stated, every person who seeks its service as carrier to bear the burden of said tax respondent does not in any way violate nor has it in any way violated its duty as common carrier.

4. That in paragraph 6 said petitioner admits and alleges and it is undoubtedly true "that it is the duty of respondent to so receive and accept and transmit said packages when duly offered or tendered to it for that purpose and the charges therefor paid or tendered," and respondent shows that in the cases of pretended violation of its duties specified and set forth in paragraph 10 of said petition and in the cases of such violation generally referred to in paragraph 11 of said petition it is not pretended nor alleged that in any case were "the charges therefor paid or tendered," which should have been the case to have made it the duty of respondent to accept any or all of said packages as claimed.

5. That said petition in paragraph 12 states that this respondent "has refused to discharge its duty as common carrier," and "has to

a material degree suspended the exercise of its function," and "has refused to accept and transport a great part of the goods, wares, and merchandise duly offered and tendered to it except upon the consent of the shipper to pay the said stamp tax, whereby great loss and damage has accrued to the people of the State," and "the trade and commerce is greatly injured by the refusal and neglect of said respondent company to perform its duties of carrier unless the stamp tax, so called, is paid by shipper and consignor so tendering such goods to said company for transportation;" that respondent submits that such acts and refusals on its part, as so alleged, do not make or present a case or cases susceptible of being rectified, reformed, or punished at the instigation of the attorney general or any other person by use of the writ of mandamus, nor do such acts and refusals make or constitute any case within the jurisdiction of this court.

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6. This respondent further shows:

That it is the policy of all taxation laws under this Government that such burdens imposed thereby shall be as generally and equitably distributed as is possible, in order that said tax burden may be cast upon the many as a small burden rather than it should be a larger one cast upon the few.

That in the act Congress seems carefully to have refrained from providing, as between shipper and carrier, which shall bear the burden of the tax, thereby evidently intending to leave it a matter of adjustment by the parties, with the stringent condition, however, that if their necessities require them to enter into the business relation of shipper and carrier, as a condition precedent to their acting as such, the tax must be paid.

7. That respondent, regularly organized and existing under and by virtue of the laws of New York and acting under regularly issued license of this State, by its organization and compliance with the laws of this State, as admitted in paragraph 5 of said petition to have been done, became vested with the right to exist in a corporate capacity, and to regulate the carrying on of its business by reasonable rules and regulations, and to fix and insist upon the payment of such rates of transportation as it deems best, provided the same are not unreasonable in amount nor in manner of payment.

8. That the enactment of the stamp act referred to being an important change in the then condition of things, it became necessary for respondent to change and regulate its method of transacting its business and to re-establish its rates of transportation, so that it might meet that change in a way to prevent its resources from being so depleted as to weaken its financial condition.

22

Respondent therefore decided to raise and did raise its rates of transportation to an amount reasonable and just and only necessary to meet the change of conditions made by said act and save itself from great loss of revenue and profits as compared with its earnings before the passage of said act.

And respondent submits and asserts that it had the full and per-

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fect right to make such change in its method of transacting its business and in its former rates for transportation.

9. That in many cases it has been customary, though not obligatory upon respondent, for it to accommodate shippers by carrying their packages and collecting the transportation charges from the consignee at the point of delivery, a privilege of great value to shippers and of great convenience to them and one wholly within the discretion of respondent to stop or deny at any time.

That under its right to regulate its manner of doing business and regulating its rates and with a view, as far as possible under the circumstances, of accommodating the public so far as paying said increase of rates, respondent has accorded to responsible shippers the right to pay such increase (either using a stamp or money for the purpose) upon delivery of the goods and the privilege of paying the balance of the rate of transportation at the point of delivery to the consignee.

10. Respondent admits that the regulation of its business affairs and change in its rate of transportation, as above stated, in
23 effect throws the burden of the said tax upon the shipper by force of circumstances, and that such effect is in accordance with the principle of taxation before referred to, that the burden should be distributed equitably among the many rather than be cast upon the few; that should respondent be compelled to pay said tax, of which the expense thereof would amount to many thousands of dollars, without its right to guard against the effect of such expenditure in the manner adopted by it in raising its rate of transportation as it has done, its financial condition would be greatly weakened.

Therefore respondent submits that it has not been guilty of any violation of its duty as common carrier; that the effect of so doing throws the burden of tax upon the shipper, does not in any way lessen or limit or interfere with the respondent's right to manage its business and regulate its rates of charges, and that the changes made in that regard are reasonable and proper, and that the petition herein does not make or state a case that will warrant this court in granting the prayer thereof.

Wherefore respondent prays that the prayer of said petition be denied and the petition dismissed.

AMERICAN EXPRESS CO.,
By W. G. SMITH,
Supt. Mich. Div., Respondent.

WISNER & HARVEY,
Attorneys for Respondent.
H. C. WISNER, *Counsel.*

24 D.

In the name of the people of the State of Michigan:

To the American Express Company, a joint stock association, and Charles F. Reed, local agent thereof, and to its and his officers, agents, and servants:

Whereas it has been made to appear to the court that the said American Express Company is a common carrier, transacting the express business, so called, in the State of Michigan, and engaged in the business of receiving, carrying, forwarding, and delivering goods, wares, and merchandise by express for hire, on behalf of all persons who may see fit to require its services, from point to point throughout the various States and Territories of the United States, and that said American Express Company has procured a certificate of authority or license from the State treasurer of the State of Michigan under and in pursuance of chapter 103 of Howell's Annotated Statutes of the State of Michigan, and thereby obtained permission to do business freely in any part of said State, and that the business of the said American Express Company is of a public character, and that said company is in the exercise of a public function in which the public have a substantial interest, and the abuse or misuse of which is of a substantial nature, and that the said American Express Company uniformly refuses to accept goods for transportation unless the shipper thereof attaches the stamp of one cent provided by the act of Congress of the United States entitled "An act to provide ways and means to meet war expenditures and for other purposes," or furnishes the moneys and means for that purpose to said company, and that said express company thereby violates its duty as a common carrier to receive, accept, transport, and deliver such goods, wares, and merchandise so offered and tendered to it for that purpose, and that such acts are in violation of the duties and obligations of said company to the people

25 of the State of Michigan:

We therefore, being willing that due and speedy justice should be done in the premises in this behalf, as is reasonable, do command and firmly enjoin you, the said American Express Company, and you, the said Charles F. Reed, its local agent, and the officers, agents, and servants of said express company, so long as you, the said American Express Company, shall continue to do business in the State of Michigan, that immediately after the receipt of this our writ you do receive and accept for transportation and delivery any and all goods, wares, and merchandise offered or tendered to you, the said express company, whether in boxes, bales, packages, or bundles, or not so enclosed or included, as a carrier from point to point upon the lines of said company, upon the usual fees therefor being paid or tendered by the shipper or consignor, his agent or servant; and to issue to the said shippers or consignors, or their agents, or the persons from whom any goods shall be delivered, as aforesaid, for transportation, a bill of lading, manifest, or other evi-

dence of receipt for forwarding, for each shipment received for carriage or transportation, with a revenue stamp of the value of one cent duly attached thereto and cancelled, as provided by an act of Congress entitled "An act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, A. D. 1898, and without requiring a stamp of the value of one cent or the equivalent thereof provided by said act of Congress to be furnished by said shipper or consignor, or his agent, servant, or other person or persons from whom any goods are received for transportation, or the payment provided by said shipper, consignor, or his agent, or other person or persons.

And how you shall have executed this our writ make known to our said circuit court for the county of Wayne, at the city of Detroit, on the first day of November, 1898.

26 Witness the Hon. Robert E. Frazer, one of the circuit judges of the third judicial circuit, at the city of Detroit, this 22nd day of September, A. D. 1898.

[SEAL.] HENRY M. REYNOLDS, *Clerk*,
By ROBERT McBRIDE, *Dep. Clerk*.

WARNER, CODD & WARNER, *Attorneys*.

27 Petition endorsed: Filed September 27, 1898. Chas. C. Hopkins, clerk supreme court.

Further endorsement: Let the writ issue. C. B. Grant, chief justice. Sept. 27, 1898.

28 In the name of the people of the State of Michigan, to the judges of the circuit court for the county of Wayne:

[Seal Supreme Court.]

We, being willing for certain causes that it should be certified to our supreme court what proceedings have been had before you and what has been done by you in the matter of granting a peremptory writ of mandamus in a cause pending in said circuit court, wherein Fred A. Maynard, attorney general, at the relation of George F. Moore, Ransom Gillis, Charles Buncher, and others are relators and The American Express Company and Charles F. Reed are respondents, do therefore command you that you distinctly and openly certify the records and proceedings in said matter to the said supreme court, before the justices thereof, that they may have them at the supreme court room, in the capitol, in the city of Lansing, on the eighth day of October, A. D. 1898, that said court may cause to be done thereupon what of right ought to be done; and have you then and there this writ.

Witness the Honorable Claudius B. Grant, chief justice of our supreme court, at Lansing, this twenty-seventh day of September, in the year of our Lord one thousand eight hundred and ninety-eight.

CHAS. C. HOPKINS,
Clerk Supreme Court.

I hereby certify that the foregoing writ was duly allowed by Honorable Claudius B. Grant, chief justice of the supreme court of Michigan, on the twenty-seventh day of September, 1898.

CHAS. C. HOPKINS, *Clerk.*

[Endorsed:] No. 17187. Supreme court of the State of Michigan. The Attorney General *ex rel.* George F. Moore *et al.*, relators, *vs.* The American Express Company *et al.*, respondents and appellants. Writ of certiorari. Filed October 8, 1898. Chas. C. Hopkins, clerk supreme court. Wisner & Harvey, att'ys for respondents.

To the supreme court of the State of Michigan:

The execution of the within writ appears by the transcript of record hereto annexed.

September 30, 1898.

HENRY M. REYNOLDS,
Clerk Wayne County,
By WALTER J. OLDFIELD, *Deputy.*

29 At a session of the supreme court of the State of Michigan held at the supreme court room, in the capitol, in the city of Lansing, on the fifteenth day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable Claudius B. Grant, chief justice; Robert M. Montgomery, Frank A. Hooker, Joseph B. Moore, Charles D. Long, associate justices.

THE ATTORNEY GENERAL *ex Rel.* GEORGE F. MOORE *et al.*, Relators,
vs.
THE AMERICAN EXPRESS COMPANY, Respondent and Appellant. } # 17187.

This matter, coming on to be heard, is argued by Mr. Carl E. Warner, for relators, and by Mr. Henry C. Wisner, for respondent, and submitted.

30 Supreme Court of Michigan.

THE ATTORNEY GENERAL *ex Rel.* GEORGE F. Moore *et al.*
vs.
THE AMERICAN EXPRESS COMPANY. } Filed December 6, 1898.

The attorney general, on the relation of various merchants in the city of Detroit, filed a petition in the Wayne circuit court for a mandamus to compel the respondent, its officers, agents, and servants, to receive, accept, transmit, and deliver any and all goods, wares, and merchandise duly offered and tendered to it in boxes, packages, etc., for transportation, when the fees and charges for such goods shall be paid or tendered, and to issue to the shippers or consignors throughout this State a bill of lading or evidence of receipt for each

shipment with the stamp duly attached thereto and cancelled by it, as provided by the act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," without requiring such consignors or shippers to pay the said stamp or value thereof.

The court below issued an order to show cause, and a return having been made to such order by the respondent, the court granted the writ as prayed. The case comes into this court by certiorari.

The respondent is a joint stock association organized and existing under the laws of the State of New York and having its principal business office in the city of New York. It is a common carrier transacting express business, so called, and engaged in the business of receiving, carrying, forwarding, and delivering goods, wares, and merchandise. It is doing business in this State in pursuance
31 of a license, issued by the State treasurer under and by virtue of chapter 103, How. Stat.

The petition shows that the respondent, upon delivery of packages to it for transportation as a common carrier, refused to accept goods for transportation unless the shipper or consignor would pay for the stamp provided by said act of Congress; that this refusal was general throughout the State by all its officers and agents, and that it has 498 agencies within this State.

The respondent, in its answer filed in the court below, admits many of the allegations in the petition; but it alleges that in the act Congress has refrained from providing as between shipper and carrier which shall bear the burden of the tax, thereby intending to leave it a matter of adjustment between the parties, conditioned, however, that the tax must be paid; that the respondent, being organized and having the right under the statute of this State to carry on an express business, becomes vested with the right to regulate the carrying on of its business by reasonable rules and regulations and to fix and insist upon the payment of such rates of transportation as it deems best, provided the same are not unreasonable in amount nor in manner of payment; that the enactment of the stamp act referred to being an important change in the then condition of things, it becomes necessary for respondent to change and regulate its method of transacting business and to re-establish its rates of transportation so that it may meet the change in a way to prevent its resources from being so depleted as to weaken its financial condition; that respondent therefore decided to raise and has raised its rates of transportation to an amount reasonable and just and only necessary to meet the change of conditions made by the act and save itself from great loss of revenue and profits as compared
32 with its earnings before the passage of the act, and which it has the lawful right to do; that under its right to regulate its manner of doing business and of accommodating the public, so far as paying said increase of rates, respondent has accorded responsible shippers the right to pay such increase (either using a stamp or money for the purpose) upon delivery of the goods and the privilege of paying the balance of the rate of transportation at the point of delivery to the consignee.

It is admitted that this change in the manner of doing business in effect throws the burden of the tax upon the shipper, but it is claimed that such effect is in accordance with the principles of taxation; that the burden shall be distributed equitably among the many rather than to be cast upon the few, and it is claimed that should the respondent be compelled to pay the tax, which would amount to many thousands of dollars, without the right to guard against the effect of such expenditure in the manner adopted by it in raising its rates of transportation, as has been done, its financial condition would be greatly weakened.

In the answer it is also alleged that in any case of pretended violation of its duties, as set forth in the petition, it was not pretended or alleged that the charges were paid or tendered, but it appears from the opinion of the court below that this point was abandoned on the argument there, and the case was left to the court below to decide, the same as if the charges had been tendered. That question will not, therefore, be discussed here, but it will be taken as settled that the charges were so tendered.

The act of Congress provided:

"SEC. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid for, and in respect of the several bonds, debentures or certificates
33 of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment or paper upon which such instruments, matters or things, or any of them, shall be written or printed, by any person or persons, or party, who shall make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule.

"SEC. 7. That if any person or persons shall make, sign or issue, or cause to be made, signed or issued, any instrument, document or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall pay a fine of not more than one hundred dollars at the discretion of the court, and such instrument, document or paper, as aforesaid, shall not be competent evidence in any court."

Schedule A of said act, among other things, provides as follows:

"Express and freight.—It shall be the duty of every railroad or steamboat company, carrier, express company or corporation, or person, whose occupation is to act as such, to issue to the shipper or consignor, or his agent or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles,

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or not so enclosed or included; and there shall be duly at-
34 tached and cancelled, as in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent; provided, that but one bill of lading shall be required on bundles or packages of newspapers when enclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier, express company or corporation or person, to a penalty of fifty dollars for each offense, and no such bill of lading, manifest or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid."

The relator contends that the duty to pay this tax is cast upon the respondent by the terms of the act, and that when the proper charges were tendered for the transportation it became the duty of the respondent to undertake the carriage, and that respondent has no right under the guise or pretense of raising its rates to cast this burden upon the public.

1. It is contended by counsel for respondent that the question is one over which the Federal courts have exclusive jurisdiction.

We cannot agree with counsel in this contention. This is not an action for the recovery of the penalty which the statute imposes for failure to issue the bill of lading, but a proceeding for an order to compel the respondent, a common carrier, to accept and carry the goods tendered it for shipment when the regular charges are paid or tendered. The respondent is a common carrier, and as such it is its duty to receive for carriage and to carry the goods of any person tendered to it for transmission, provided they are such as it holds itself out as willing to carry and the party tendering them offers to pay its proper charges. This duty is imposed by law. Am. & Eng. Enc. Law, vol. 5, 2nd ed., 158, 159.

35 The respondent is permitted to do business in this State, though not incorporated under the laws of the State, but it is subject to all the duties and obligations which the law imposes upon common carriers, and for a refusal to carry goods when tendered and charges paid the State courts may be appealed to for redress. This matter is entirely between the shippers and the company. This view is held by the Attorney General of the United States in a recent opinion, in which he says: "In all controversies arising between the shippers and express companies as to which one shall be required to bear the expense of the stamp the General Government has no direct concern under the war-revenue law."

The General Government, it appears, refuses to proceed against express companies for a violation of the act unless it be made to appear that the company has accepted for transportation such goods for shipment and has refused to attach the stamp thereon—that is, the General Government may and will prosecute for the penalty fixed by the act when the goods are received and shipped without the company's affixing the revenue stamp to the receipt or bill of lading, but it will not interfere between the public and the company for refusal to carry. The Commissioner of Internal Revenue

on August 1, 1898, decided that the aggrieved parties—that is, the parties offering goods for shipment—when the company refuses to carry without payment of the stamp, must depend for redress upon the common or the statute law of the State defining the obligations of common carriers.

2. Unless, therefore, the shipper should pay the tax, the company is bound to carry upon the payment or tender of the regular charges. The company is vested with the exercise of public functions under the permissive power of the State, and when it refuses to discharge the duties imposed by law, mandamus is the
36 proper remedy to compel the discharge of that duty. The American courts have taken such occupations under their control, and, regarding them as public agencies, have enforced the common law or the statutory law against them, and have not hesitated to grant the writ of mandamus against any party who, having assumed public duties, refuses to discharge them. Haugen *v.* Albinia A. Co., 28 Pac. Rep. (Oregon), 244; Olmsted *v.* Proprietors of Morris Aqueduct, 47 N. J. L., 311.

But counsel contends further that the power given to the circuit courts to issue mandamus rests upon rule 48 of this court, which provides: "Circuit courts shall have jurisdiction within their respective counties in all mandamus proceedings involving the action of any officer or board of any county, township, city, or school district, or the common council of any city or village, and the action of any private corporation or officer or board thereof," and that this rule not having included joint-stock associations, the circuit courts are not vested with power to issue the writ.

Corporations and associations are convertible and often used as synonymous terms. There is no reason for any distinction or discrimination between corporations and joint-stock associations in applying this rule. It is the intent of the rule to place all mandamus proceedings of this character primarily in the circuit courts. In reference to the assessment and collection of specific taxes, the legislature of this State has recognized the terms as convertible.

Sec. 1255, How. Stat., provides: "The term corporation as used in this act shall be construed to include all associations and joint-stock companies having any of the powers and privileges of corporations not possessed by individuals or partners."

37 In Maltz *v.* American Express Co., 1 Flippin, U. S. Court, 611, it was held that, whether a corporation or not, a joint-stock association is a distinct legal entity, and that so long as this fact exists and it possesses the attributes of perpetual succession and the capacity of suing and being sued, it is a judicial person and must be regarded as a citizen of the State which creates it; and it is wholly immaterial whether it be termed an association, joint-stock association, or guild.

3. The main question in the case relates to the construction to be placed upon the act in question.

By the act every express company is compelled to issue to every shipper or consignor, etc., a bill of lading for each shipment received for carriage, to which bill of lading and duplicate thereof there

shall be attached and cancelled a stamp of the value of one cent. The law therefore imposes upon the carrier the obligation to issue the receipt. With this the shipper has nothing to do. He delivers the package to the company, pays or tenders the usual charges. This ends the shipper's duty, and the law then compels the carrier to issue the receipt or bill of lading.* This bill must be stamped and the stamp cancelled. It is evident that it is as much the duty of the company to place the stamp upon the receipt and cancel it as it is to issue the receipt. This duty is made more apparent by the fact that the act further provides that failure to issue the receipt makes the carrier so failing amenable to a heavy penalty.

But it is contended by counsel in a brief filed with this court that the penalty was directed and intended by Congress to be directed to the failure to issue the receipt and nothing more, leaving the question of the stamping of the same to be settled by the parties.

It seems to us that what is meant by this clause is that the receipt must be such as is provided—that is, a receipt
38 bearing the proper stamp—and that the penalty is provided for such a failure as this. It is and always has been the custom of express companies to issue receipts for goods delivered for shipment. The only interest the Government has or can have is the affixing and cancellation of the stamp to aid it in its war revenues. We are therefore led to the conclusion that the duty to issue the receipt and the penalty affixed for the failure to do so implies that it is to be a receipt which would bring the Government the revenue provided; therefore the act makes it the duty of the company to affix the stamp.

4. It is contended, however, that the company has the right to make new regulations and establish new rates to meet this burden. It is conceded that the effect of this is to throw the burden upon the shipper.

It is apparent upon the face of this proceeding that the very purpose of this change in the regulations and the increase of rates is to avoid the payment of the tax, and thus cast upon the shippers the burden which the act of Congress puts upon the company. This is but an evasion and a subterfuge to avoid the terms of the act.

The pretence that by raising the charges on each package just one cent, without reference to the distance to be carried, the weight or bulk of the package, and the former fixed charges, is a regulation of charges can hardly be treated seriously. If the charges established were regarded as too small, it would seem that the action would have been to make the additions in some manner to correspond to the length of carriage, weight, etc., but to add one cent to every charge for carriage bears upon its face evidence of the attempt to evade the act. Where the charge established was twenty-five cents, it is now twenty-six cents; where it was fifty cents, it
39 is now fifty-one cents; where one dollar, it is now one dollar and one cent, and so on, adding just one cent to each charge. It cannot be that this was done because the charge was too low for each carriage, however long the distance or however weighty the article. The statement of this claim is its own refutation.

We are aware that Judge Lacom-e, of the U. S. circuit court of New York, has held the other way upon this question in the case of The Merchants' Association of New York *v.* Adams Express Company, as also the U. S. circuit courts of North Carolina and California, but we are unable to agree with those cases. Judge Tuley, in the superior court of Cook county, Illinois, has, however, held in accordance with our views here expressed. It is said by him that "it is not in fact a revision or increase of rates, but an arbitrary attempt of the company to make the shippers pay a tax which the law requires the company to pay. The court must regard the substance of the contention and not the pretense."

5. It is further contended that the order of the court below is too broad; that the writ should run against the company only so far as to affect the parties to this record.

The petition is filed by the attorney general of the State, in which it is stated that these case- constitute but few of the many of like character, and is presented for the purpose of representing the uniform course of practice of the respondent company. This is not denied by the answer, but, on the contrary, the claim is made therein that the regulation of its business affairs and change in its rates of transportation throw the burden of the tax upon the shipper by force of circumstances. It is thus apparent that the attorney general's petition, taken with the answer of the respondent, is sufficient to show that the respondent is attempting to enforce this rule throughout the State in its dealings with all its customers, and the case involves the question whether the order should be broad
40 enough to reach the rights of all classes who are shippers within the State. We think the order should not be modified as claimed.

The judgment of the court below must be affirmed.

CHAS. D. LONG.
J. B. MOORE.
R. M. MONTGOMERY.
C. B. GRANT.
FRANK A. HOOKER.

41 At a session of the supreme court of the State of Michigan held at the supreme court room, in the capitol, in the city of Lansing, on the sixth day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable Claudius B. Grant, chief justice; Robert M. Montgomery, Frank A. Hooker, Joseph B. Moore, Charles D. Long, associate justices.

THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN on the Relation of George F. Moore *et al.*, Relators,
vs.
THE AMERICAN EXPRESS COMPANY and CHARLES F. Reed, Respondents and Appellants. } # 17187.

The record and proceedings in this cause having been removed

to this court by writ of certiorari issued to the circuit court for the county of Wayne, and the same and the matters in error assigned having been seen and inspected and duly considered by the court and no error appearing therein, therefore it is ordered and adjudged that the order of said circuit court for the county of Wayne granting a peremptory writ of mandamus herein be, and the same is hereby, in all things affirmed; and it is further ordered and adjudged that the relators recover of and from the respondents their costs, to be taxed, and have execution therefor.

42 *Bond.*

Know all men by these presents that we, the American Express Company, a joint stock association of New York, as principal, and the American Surety Company of New York, as surety, are held and firmly bound unto Fred A. Maynard, attorney general of the State of Michigan, *ex rel.* George F. Moore *et al.*, in the full and just sum of two thousand five hundred dollars, to be paid to the said Fred A. Maynard, attorney general of the State of Michigan, *ex rel.* George F. Moore *et al.*, his certain attorney, executors, administrators, successor, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3rd day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a session of the supreme court of the State of Michigan, in a suit depending in said court between Fred A. Maynard, attorney general, on the relation of George F. Moore *et al.*, and The American Express Company, a judgment was rendered against the said American Express Company, and the said American Express Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Fred A. Maynard, attorney general of the State of Michigan, *ex rel.* George F. Moore *et al.*, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said American Express Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

43 AMERICAN EXPRESS CO.,
By G. W. MARKS, *Agent.* [SEAL.]
AMERICAN SURETY COMPANY
OF NEW YORK,
By JOHN F. RODGERS,
Resident Vice-President.
Attest: LEONARD DAMMANN,
Resident Ass't Secretary.

Sealed and delivered in presence of—
E. C. OWEN,
As to express company.
F. C. HARVEY,
As to both signatures.
M. S. CARPINTER,
As to surety company.

Approved by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

Jan. 30, 1899.

Endorsed: Filed Jan. 6, 1899. Chas. C. Hopkins, clerk supreme court.

44 *Petition for Allowance of Writ of Error.*

To the Honorable John M. Harlan, associate justice of the Supreme Court of the United States:

The petition of the American Express Company, a joint stock association organized and existing under the laws of the State of New York, respectfully shows:

1. That it is the respondent in a cause commenced in the circuit court for the county of Wayne and State of Michigan, wherein Fred A. Maynard, attorney general of the State of Michigan, on the relation of George F. Moore *et al.*, is the relator; which said cause proceeded to judgment in said circuit court in favor of said relator, a copy of which said judgment and the writ of mandamus issued in pursuance of said judgment is hereto attached and made a part hereof, marked Exhibit "A."

2. That thereupon the said petitioner sued out a writ of certiorari to the supreme court of Michigan, which is the final court of appeal in said State, and the said judgment was thereupon reviewed by said supreme court.

3. That the right claimed by said relator and set forth in relator's petition is substantially as follows: That the American Express Company, a common carrier, violated its duty as such by refusing to receive for carriage goods, wares, and merchandise offered and tendered to it by shippers unless the shipper attached to the bill of lading, manifest, or other evidence of receipt and forwarding the stamp required by the provisions of an act of Congress of June 13th, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," and that said respondent sought to evade the payment of the stamp tax, so called, by requiring the shipper to pay said tax.

That the answer of said respondent denied that under said
45 act of Congress it was the duty of respondent to attach said stamps to said bills of lading, manifests, or evidences of receipt and forwarding, and that it had the right to compel the ship-

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per to pay said tax before the acceptance by respondent of the goods and wares to be carried and before the issuance by it of said receipt, manifest, or evidence of receipt and forwarding.

4. That after the hearing on said writ of certiorari in said supreme court on December 6th, 1898, a judgment was entered in said supreme court affirming the judgment of the circuit court for the county of Wayne, the decision of said court being against the right set up and claimed by respondent, the said supreme court holding that the act of Congress of June 13th, 1898, made it the duty of the respondent to affix and bear the expense of said revenue stamp provided for by said act.

5. That on December 28th, 1898, application was made by petitioner to the chief justice of the supreme court of Michigan for the allowance of a writ of error to the Supreme Court of the United States in accordance with the provisions of the statutes of the United States; that on the 29th day of December, 1898, the said chief justice refused to allow the issuance of said writ of error, giving as a reason therefor that there was no Federal question involved in the proceeding.

Wherefore your petitioner prays that you endorse hereon or on the draft of a writ of error herewith presented an order allowing the issuing of a writ of error to remove the record of said cause to the Supreme Court of the United States for review, in accordance with the provisions of section 709 of the Revised Statutes of the United States of 1878, and that a citation may issue under the seal of the said court directed to the said Fred A. Maynard, attorney general of the State of Michigan, as required by the rules and practice of said court.

And your petitioner will ever pray.

AMERICAN EXPRESS CO,
By CHARLES F. REED, *Gen'l Ag't.*

46 STATE OF MICHIGAN, } ss:
County of Wayne, }

Charles F. Reed, being duly sworn, deposes and says that he is the general agent of the American Express Company, and signed the foregoing petition in its behalf; that he has read the same and knows the contents thereof, and the same is true in substance and in fact.

CHARLES F. REED.

Subscribed and sworn to before me December 30th, 1898.

[Seal of Fred C. Harvey, Notary Public, Wayne Co., Mich.]

F. C. HARVEY,
Notary Public, Wayne County, Michigan.

Writ of error allowed. Supersedeas upon execution of bond in penalty of two thousand five hundred dollars. This January 2d, 1899.

JOHN M. HARLAN,
Asso. Justice Sup. Ct. U. S.

47 EXHIBIT A.

At a session of the circuit court for the county of Wayne and State of Michigan, held at circuit court room No. 4 of said court, in the city of Detroit, on the 21st day of September, A. D. 1898.

Present: Hon. Robert E. Frazer, circuit judge.

FRED A. MAYNARD, Attorney General, *ex Rel.* GEORGE F. Moore *et al.*
vs.
THE AMERICAN EXPRESS COMPANY and CHARLES F. Reed. } No. 38638.

The above-entitled cause having heretofore, on the 13th day of August, 1898, been submitted for hearing, it is now by the court ordered that a writ of mandamus do issue in accordance with the prayer of said petition; and it is further ordered that a stay of all proceedings be had for the period of ten days from this date.

ROBERT E. FRAZER,
Circuit Judge.

48 EXHIBIT A.

In the name of the people of the State of Michigan:

To the American Express Company, a joint stock association, and Charles F. Reed, local agent thereof, and to its and his officers, agents, and servants:

Whereas it has been made to appear to the court that the said American Express Company is a common carrier, transacting the express business, so called, in the State of Michigan, and engaged in the business of receiving, carrying, forwarding, and delivering goods, wares, and merchandise by express for hire on behalf of all persons who may see fit to require its services from point to point throughout the various States and Territories of the United States, and that said American Express Company has procured a certificate of authority or license from the State treasurer of the State of Michigan under and in pursuance of chapter 103 of Howell's Annotated Statutes of the State of Michigan, and thereby obtained permission to do business freely in any part of said State, and that the business of the said American Express Company is of a public character, and that said company is in the exercise of a public function in which the public have a substantial interest, and the abuse or misuse of which is of a substantial nature, and that the said American Express Company uniformly refuses to accept goods for transportation unless the shipper thereof attaches the stamp of one cent provided by the act of Congress of the United States entitled "An act to provide ways and means to meet war expenditures and for other purposes," or furnishes the moneys and means for that purpose to said company, and that said express company thereby violates its duty as common carrier to receive, accept, transport, and deliver such goods, wares,

and merchandise so offered and tendered to it for that purpose, and that such acts are in violation of the duties and obligations of said company to the people of the State of Michigan, we, therefore, being willing that due and speedy justice should be done in the premises in this behalf as is reasonable, do command and firmly enjoin you, the said American Express Company, and you, the said Charles F. Reed, its local agent, and the officers, agents,
49 and servants of said express company, so long as you, the said express company, shall continue to do business in the State of Michigan; that immediately after the receipt of this our writ you do receive and accept for transportation and delivery any and all goods, wares, and merchandise offered or tendered to you, the said express company, whether in boxes, bales, packages, or bundles or not so enclosed or included, as a carrier from point to point upon the lines of said company, upon the usual fees therefor being paid or tendered by the shipper or consignors, his agent or servant, and to issue to the said shipper or consignors, or their agents, or the persons from whom any goods shall be delivered, as aforesaid, for transportation a bill of lading, manifest, or other evidence or receipt and forwarding for each shipment received for carriage or transportation, with a revenue stamp of the value of one cent duly attached thereto and cancelled, as provided by an act of Congress entitled "An act to provide ways and means to meet war expenditures, and for other purposes," approved June 13th, A. D. 1898, and without requiring a stamp of the value of one cent, or the equivalent thereof, provided by said act of Congress to be furnished by said shipper or consignor or his agent, servant, or other person or persons from whom any goods are received for transportation or the payment provided by said shipper, consignor, or his agent or other person or persons.

And how you shall have executed this our writ make known to our said circuit court for the county of Wayne, at the city of Detroit, on the 1st day of November, 1898.

Witness the Hon. Robert E. Frazer, one of the circuit judges of the third judicial circuit, at the city of Detroit, this 22nd day of September, A. D. 1898.

(S'g'd) HENRY M. REYNOLDS, *Clerk*,
[SEAL.] By ROB'T McBRIDE, *Dep. Clerk*.

WARNER, CODD & WARNER, *Attorneys*.

50 [Endorsed:] 17187. Supreme Court of the United States. Fred A. Maynard, attorney general, *ex rel.* George F. Moore *vs.* The American Express Company. Petition of American Express Company for writ of error to supreme court of Michigan. Filed Jan. 7, 1899. Chas. C. Hopkins, clerk supreme court of Michigan.

51 The Supreme Court of the United States.

THE AMERICAN EXPRESS COMPANY, Plaintiff in Error,
vs.
FRED A. MAYNARD, Attorney General of the State of Michigan, on the Relation of George F. Moore, Ransom Gillis, Charles Buncher, Frank S. Munger, Abram P. Sherrill, James S. Meredith, Henry A. Krolik, Herman Krolik, William H. Strong, James L. Lee, Hal W. Glover, George R. Treble, James W. Fales, William J. Fales, James K. Burnham, Albert H. Munger, Frederick C. Stoepel, Joseph J. Crowley, James Wilson, and The American Harrow Company, a Body Corporate, Defendant in Error.

Error to the Supreme Court of the State of Michigan.

Assignments of Errors.

And now comes the plaintiff in error in the case entitled above, by Henry C. Wisner and Fred C. Harvey, its attorneys, and alleges error in the proceedings had in the supreme court of the State of Michigan as follows:

1. The supreme court of the State of Michigan erred in deciding that the matter presented in this cause is not within the exclusive jurisdiction of the Federal courts.

2. The supreme court of the State of Michigan erred in deciding that under the act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," said plaintiff in error is absolutely bound to supply and affix the stamp required by said act without exacting the price of said stamp from its customers.

3. The supreme court of Michigan erred in deciding that under said act, as Congress had refrained from providing, as be-
52 tween shipper and carrier, which should bear the burden of said tax, it had thereby left it a matter of adjustment between the express company and its customer.

4. The supreme court of Michigan erred in deciding that a proper construction of said war revenue act requires express companies to pay for the stamps to be affixed to receipts they give and forbids said companies exacting the price of such stamps from their customers.

5. The supreme court of the State of Michigan erred in deciding that by the terms of said war revenue act plaintiff in error is prohibited from raising its rates of service — an amount just equal to that required to purchase the necessary stamps provided by such act and exacting the same from its customers before accepting the property tendered for transportation in the manner that said plaintiff in error has been doing under its new regulations and rates

made to meet the burden placed upon it by said act in cases where it supplied the stamp, as shown under the pleadings in this cause.

6. The supreme court of the State of Michigan erred in deciding that, as shown by the pleadings herein, the change in the regulations and the increase of rate so made by plaintiff in error is to avoid the payment of said tax and thus cast upon the shipper the burden which the act of Congress puts upon the company; that the same is but an arbitrary attempt of the plaintiff in error to make the shippers pay a tax which the law requires the plaintiff in error to pay, and that the same is therefore void.

And because of the errors aforesaid said plaintiff in error prays that the judgment of the supreme court of the State of Michigan may be reversed, set aside, and held for naught.

HENRY C. WISNER,
FRED C. HARVEY,
Detroit, Michigan, Attorneys for Plaintiff in Error.

[Endorsed:] 17187. Filed Feb. 15, 1899. Chas. C. Hopkins, clerk.

53 UNITED STATES OF AMERICA, *ss*:

To Fred A. Maynard, attorney general of the State of Michigan, on the relation of George F. Moore, Ransom Gillis, Charles Buncher, Frank S. Meredith, Henry A. Krolik, Herman Krolik, William H. Strong, James L. Lee, Hal W. Grover, George R. Treble, James W. Fales, William J. Fales, James K. Burnham, Albert H. Munger, Frederick C. Stoepel, Joseph J. Crowley, James Wilson, and the American Harrow Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Michigan, wherein The American Express Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this third day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

54 [Endorsed:] 17187. Filed Jan. 7, 1899. Chas. C. Hopkins, clerk.

I hereby accept service of a true copy of the within citation this 6th day of January, A. D. 1899.

HORACE M. OREN,
Attorney General of the State of Michigan.
FRED A. MAYNARD,
Ex-Attorney General.

55 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Michigan, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Michigan, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Fred A. Maynard, attorney general of the State of Michigan, on the relation of George F. Moore, Ransom Gillis, Charles Buncher, Frank S. Meredith, Henry A. Krolik, Herman Krolik, William H. Strong, James L. Lee, Hal W. Grover, George R. Treble, James W. Fales, William J. Fales, James K. Burnham, Albert H. Munger, Frederick C. Stoepel, Joseph J. Crowley, James Wilson, and The American Harrow Company, as relators, and The American Express Company, a body corporate, and Charles F. Reed, as respondents, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitu-

56 tion or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said American Express Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the third day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 17187. Filed Jan. 7, 1899. Chas. C. Hopkins, clerk.

57	The Attorney General *ex Rel.* George F. Moore, Ransom Gillis, and Others, Relators, *vs.* The American Express Company, Respondent and Appellant.	Warner, Codd & Warner. Certiorari to Wayne.	Wisner & Harvey.

Journal.	Date.	Proceedings.
	1898.	
	Sep. 27	Petition filed.
	" "	Writ allowed by Grant, C. J., and issued, returnable October 8, 1898.
	Oct. 8	Proof of service filed.
	" "	Return filed.
	" 17	Notice of hearing filed.
P. 123..	Nov. 15	Argued and submitted.
P. 146..	Dec. 6	Affirmed with costs.
	1899.	
	Jan. 7	Petition for writ, with allowance thereon, filed.
	" 7	Writ of error to Supreme Court U. S. received and filed.
	" 7	Citation, with acceptance of service, filed.
	" 7	Bond, duly approved, filed.
	Feb. 15	Assignment of errors, Supreme Court U. S., filed.
	Feb. 16	Return made to Supreme Court U. S.

58 Supreme Court of the State of Michigan.

FRED A. MAYNARD, Attorney General of the State of Michigan, on the Relation of George F. Moore *et al.*, Relator- and Defendant- in Error,

vs.

THE AMERICAN EXPRESS COMPANY, Respondent and Plaintiff in Error.

STATE OF MICHIGAN, *ss:*

In the Supreme Court.

I, Charles C. Hopkins, clerk of the supreme court of the *supreme court of the* State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and entered in the above-entitled cause by said court, including the written decision and reasons therefor, signed by the judges of said court and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original and it is a true transcript therefrom and of the whole

thereof; that attached thereto are the writ of error, with allowance endorsed thereon; the citation, with acknowledgment of service endorsed thereon; a copy of the bond to the adverse party filed, with the writ of error, and the assignment of errors in the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this 16th day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Endorsed on cover: File No., 17,308. Michigan supreme court. Term No., 723. The American Express Company, plaintiff in error, *vs.* Fred A. Maynard, attorney general of the State of Michigan, *ex rel.* George F. Moore *et al.* Filed February 21, 1899.

Motion Papers.

October Term, 1890.

Supreme Court of the United States.

No. 12

THE AMERICAN EXPRESS COMPANY

Plaintiff in Error,

vs.

FRED. A. MAYNARD, Attorney-General of the State of Michigan, on relation of GEORGE F. MOORE et al.,

Defendants in Error.

NOTICE OF MOTION TO ADVANCE MOTION AND AFFIDAVIT.

LEWIS CASS LEDYARD,

Of Counsel.

In the Supreme Court of the United States

THE AMERICAN EXPRESS COMPANY,
Respondent and Plaintiff in Error,

AGAINST

FRED A. MAYNARD, Attorney-General of the State of Michigan, on relation of GEORGE F. MOORE ET AL.,
Petitioner and Defendant in Error.

Notice of Motion to Advance.

Notice is hereby given that, upon the affidavit of Lewis Cass Ledyard, verified the 21st day of April, 1899, and upon the record in the above-entitled suit removed to this Court by writ of error to the Supreme Court of the State of Michigan, I shall on Monday, May 1st, 1899, at the opening of Court on that day, or as soon thereafter as counsel can be heard, submit to the Supreme Court of the United States at the Capitol in the City of Washington, and argue, a motion to advance this case attached hereto, a copy of which is herewith served on you.

LEWIS CASS LEDYARD,
Of Counsel for Plaintiffs in Error.

To MR. C. E. WARNER,
Of Counsel for Defendant in Error.

LEED. THROUGH POOR COPY

IN THE
SUPREME COURT OF THE UNITED STATES.

THE AMERICAN EXPRESS COMPANY, Respondent and Plaintiff in Error, AGAINST FRED A. MAYNARD, Attorney-General of the State of Michigan, on relation of GEORGE F. MOORE ET AL., Petitioner and Defendant in Error.	Motion to Advance.

Now comes The American Express Company, the said plaintiff in error, by Lewis Cass Ledyard, its counsel, and upon the affidavit of the said Lewis Cass Ledyard and the record in the above-entitled suit, removed to this Court by writ of error to the Supreme Court of the State of Michigan, moves this Honorable Court that this case may be heard on the day fixed by order of the Court for the hearing of the case of Crawford, complainant-appellant, against William L. Hubbell, as treasurer of the Adams Express Company, defendant-appellee—to wit, on the 16th day of October, 1899—and that the 2d day of October, 1899, be fixed for the argument of this case, and for such other relief as to this Honorable Court may seem just.

Dated April 21st, 1899.

LEWIS CASS LEDYARD,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

THE AMERICAN EXPRESS COMPANY,
Respondent and Plaintiff in Error,

AGAINST

FRED A. MAYNARD, Attorney-General of the State of Michigan, on relation of GEORGE F. MOORE ET AL.,
Petitioner and Defendant in Error.

SOUTHERN DISTRICT OF NEW YORK, }
County of New York, } ss.:

LEWIS CASS LEDYARD, being duly sworn, deposes and says he is the attorney for the plaintiff in error in the above-entitled action; the writ of error in this case has been obtained to review the decision of the Supreme Court of Michigan affirming the judgment of the Circuit Court for the County of Wayne that a mandamus issue to the American Express Company and Charles F. Reed, commanding it and him to receive, accept, transmit and deliver any and all goods, wares and merchandise offered or tendered to the company for transportation when the fees and charges for such goods are paid, offered or tendered, and to issue to the shippers or consignors throughout the State of Michigan a bill of lading or other evidence of receipt for each shipment with the stamp required by the Act of Congress of June 13th, 1888, duly attached thereto and canceled, without demanding or requiring of such consignors or shippers the said stamp or the value thereof.

BLEED. THROUGH POOR COPY

This case arises upon the same state of facts that are presented in the case of William Crawford, Complainant-Appellant, vs. William L. Hubbell; as Treasurer of the Adams Express Company, Defendant-Appellee, and in it the same questions are involved on which the Circuit Court of Appeals for the Second Circuit desires the instruction of this Court for the proper determination of that case, and which the said Court has certified to this Court for its determination, to wit:

"(1) Does the War Revenue Act of June 13, 1898, impose upon the carrier exclusively the tax represented by the stamp to be affixed to each bill of lading, manifest or other evidence of receipt required to be issued to eace shipper of goods accepted by the carrier for transportation; or does it impose the tax merely upon the transaction of shipment, leaving it to be paid indifferently by either party thereto?

"(2) If the War Revenue Act of June 13, 1898, does impose such tax exclusively upon the carrier, does it preclude the carrier, who is by such act required to issue to each shipper a bill of lading, manifest or other evidence of receipt, from relieving itself of the expense of affixing and canceling the stamp required to be attached to such bill of lading, manifest or other evidence of receipt?"

This Court, by an order dated the 11th day of April, 1899, has fixed the sixteenth day of October, 1899, for hearing argument upon the questions certified to it in case of Crawford vs. Hubbell, and it will promote the public interest if this case can be heard at the same time.

(Sd.) LEWIS CASS LEDYARD.

Sworn to before me this 21st day of April, 1899.

WALTER F. TAYLOR,
Notary Public,
New York County.

[SEAL.]

In the

Supreme Court of the United States.

October Term, 1899. No. 72.

THE AMERICAN EXPRESS COMPANY,

Plaintiff in Error,

vs.

FRED. A. MAYNARD, Attorney-General of the State of Michigan, on relation of GEORGE F. MOORE et al.,

Defendant in Error.

Brief on Behalf of Plaintiff in Error in Opposition to Motion to Dismiss Writ of Error.

LEWIS CASS LEDYARD,

Of Counsel for Plaintiff in Error.

C. G. Hoagland, Printer and Bookbinder, N. Y.

In the Supreme Court of the United States.

THE AMERICAN EXPRESS COMPANY,
Plaintiff in Error,

AGAINST

FRED A. MAYNARD, Attorney-General of the State of Michigan, on relation of GEORGE F. MOORE ET AL,
Defendant in Error.

Brief in Behalf of Plaintiff in Error in in Opposition to Motion to Dismiss Writ of Error.

The defendant in error, in his petition in the State Court, alleges (Transcript of Record, p. 6) the passage by Congress of the act of June 13th, 1898, known as the War Revenue Act, and sets up certain of the provisions of that act, and further alleges (p. 7): "That, by reason of a desire of the respondent to avoid the payment of the stamp tax so called, and to impose such obligation upon the shipper the respondent herein refuses to accept any goods for transportation, unless such shipper attaches the stamp to the said bill of lading, manifest or other evidence of receipt and forwarding for each shipment, or furnishes the money and means for that purpose to the said company, and that the said company thereby not only avoids its duty

under said Act of Congress to pay and bear its proportion of the revenues to meet war expenditures, as provided by said act, but violates its duty as a common carrier to receive, accept, transport and deliver such goods, wares and merchandise so offered and tendered to it for that purpose.

The prayer of the petition is (p. 10):

"Your petitioner therefore prays that a peremptory mandamus may issue to the said The American Express Company and Charles F. Reed, the local agent thereof, respondents, and to its officers, agents and servants, commanding it and them to receive, accept, transmit and deliver any and all goods, wares and merchandise duly offered or tendered to it in boxes, bales, packages or bundles, or not so enclosed or included for transportation, when the fees and charges for such goods are paid, offered or tendered to said company, and to issue to the shippers or consignors throughout the State of Michigan, or their agent or agents, or persons from whom any such goods are received for transportation, a bill of lading, manifest or other evidence of receipt and forwarding for each shipment received for carriage and transportation, with the stamp duly attached thereto and canceled by it, as provided by the Act of Congress hereinbefore mentioned, and without demanding or requiring of such consignors or shippers the said stamp, or the value thereof."

The plaintiff in error in its answer in the State Court alleges "that under the terms of said Act of Congress, properly construed, it is not made respondent's duty to pay said tax" (p. 19).

"That in the act, Congress seems carefully to have refrained from providing, as between shipper and carriers, which shall bear the burden of the tax, thereby evidently intending to leave it a matter of adjustment by the parties" (p. 21).

* * * * * *

"That the enactment of the Stamp Act referred to, being an important change in the then condition of things, it became necessary for respondent to change and regulate its method of transacting its business, and to re-establish its rates of transportation, so that it might meet that change in a way to prevent its resources from being so depleted as to weaken its financial condition.

"Respondent, therefore, decided to raise, and did raise, its rates of transportation, to an amount reasonsonable and just and only necessary to meet the change of conditions made by said act, and save itself from great loss of revenue and profits as compared with its earnings before the passage of said act.

"And respondent submits and asserts that it had the full and perfect right to make such change in its method of transacting its business and in its former rates of transportation" (p. 22).

The plaintiff in error further alleges in its answer that the facts stated in the petition do not constitute a case within the jurisdiction of the Court (fol. 21).

The suit was submitted to the State Court on petition and answer, and it was ordered that a writ of mandamus issue in accordance with the prayer of the petition.

The Supreme Court holds in its opinion that the main question in the case relates to the construction to be placed on the War Revenue Act; that by that act the carrier is required to provide the stamp for the bill of lading, manifest or other evidence of receipt, and he is by implication forbidden to cast the burden of the tax upon the shipper by raising his rates for that purpose (pp. 37 *et seq.*).

The reasonableness of the rates charged by the plaintiffs in error, apart from the question of the tax, is not called in question either by the petitioner or the Court.

The Court states in its opinion: "It is contended by counsel for the respondent that the question is one

over which the Federal Courts have exclusive jurisdiction." This contention is overruled by the Court.

ARGUMENT.

I. The decision of the State Court sought to be reviewed turned upon the construction of a statute of the United States, and the decision of the State Court was against a right, title, privilege or immunity claimed thereunder by plaintiff in error.

What questions were raised and decided in the State Court is to be determined by an examination of the whole record and of the record the opinion of the State Court forms a part.

Rule 8, Subdivision 2, Sayward vs. Denny, 158 U. S., 183.

The plaintiff in error specially set up and claimed in the State Court the right under the Act of June 13th, 1898, known as the War Revenue Act, to refuse to accept goods for transportation, unless the person offering the goods provides the stamp for the bill of lading, manifest or other evidence of receipt required to be issued to each shipper of goods accepted for transportation.

The defendant in error in his petition in the State Court alleged that the plaintiff in error by refusing to accept goods for transportation as above, violates its duty under the War Revenue Act, and its duty as a common carrier. To these allegations the plaintiff in error in effect answered that, by the statute they are permitted to exempt themselves from the burden of the tax in the manner adopted by them, and that the express company in requiring the shippers to pay the tax represented by the stamp did not raise its rates to an amount more than was reasonable and just and necessary under the new conditions brought about by the War Revenue Act.

BLEED. THROUGH POOR COPY

As the suit was heard upon petition and answer, the State Court must have assumed the second of these allegations—in so far as it was an allegation of fact—to be true. The only way, therefore, in which the Court could have reached the conclusion reached by it was by holding as a matter of law that the amount of the tax could not be considered as an item of expense attending the transportation of goods to be taken into account in fixing reasonable rates.

The opinion of the Court shows that its conclusion was in fact reached by this mode of reasoning:

The Court says: "The Act makes it the duty of the Company to affix the stamp.

"It is contended, however, that the Company has the right to make new regulations and establish new rates to meet this burden. It is conceded that the effect of this is to throw the burden upon the shipper.

"It is apparent upon the face of the proceeding that the very purpose of this change in the regulations and the increase of rates is to avoid the payment of the tax and thus cast upon the shippers the burden which the act of Congress puts upon the Company. This is but an evasion and a subterfuge to avoid the terms of the act. The pretence that by raising the charges on each package just one cent, without reference to the distance to be carried, the weight or bulk of the package, and the former fixed charges, is a regulation of charges, can hardly be treated seriously."

It must be concluded that the decision of the State Court was based wholly upon its construction of the Federal statute and the rights and duties created thereby and not on any independent ground of the common-law obligations of the plaintiff in error as a common carrier.

The plaintiff in error in support of the right claimed by it under the statute alleged that by the true construction thereof the tax represented by the stamp is imposed upon the transaction of shipment, it being left to be determined by the contract between

the parties thereto which shall bear the burden of the tax, and that consequently the right is reserved to the carrier to treat the amount of the tax as an addition to the expenses attending the performance of the service justifying a compensatory increase in the charge for the performance of it.

The right claimed by the plaintiff in error was defeated by the construction placed by the State Court upon the statute and would have been sustained by an opposite construction. The case is, therefore, one which involves the construction of a Federal statute within the meaning of Sec. 709 of the Revised Statutes.

Starin vs. New York, 115 U. S., 248.

The only question that remains is: Was the right claimed by the plaintiffs in error "a title, right, privilege or immunity" specially set up and claimed under the Federal statute?

It is immaterial that the precise sections of the statute on which the claim was based were not referred to in the pleadings and that the claim was not made in the language of Sec. 709.

Davis vs. Packard et al., 6 Pet., 41.

The record shows that an act of Congress was applicable to the case upon the facts presented to the Court; that the plaintiff in error based its claim to relief upon a particular construction of a Federal statute, and that the statute was otherwise construed.

Also it must be that the right claimed was a right "under the statute," for certainly at least one party was claiming a right under the statute. But, if the right claimed by the defendant in error to require the plaintiff in error to bear the whole burden of the tax was a right claimed under the statute, the right claimed by the plaintiff in error to exempt itself by contract from the payment of the tax was equally a right claimed under the statute, or a privilege, or immunity claimed thereunder.

The clause of the act requiring a stamp to be placed upon a bill of lading or other evidence of receipt and forwarding issued by an express company is found in Schedule A and is as follows:

"Express and Freight: It shall be the duty of every railroad or steamboat company, carrier, express company or corporation or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so enclosed or included; and there shall be duly attached and canceled, as is in this act provided, to each of said bills of lading, manifests or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: *Provided*, that but one bill of lading shall be required on bundles or packages of newspapers when enclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier, express company or corporation or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid."

Section 6 of the act provides:

"SEC. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid, for and in respect of the several bonds, debentures or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment or paper upon which such instruments, matters or things, or any of them, shall be written or printed by any person or persons, or party who shall

make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule."

The plaintiff in error contended in the State Court that according to the true construction of the foregoing provisions, the carrier is required to pay the tax unless and except when by the contract the shipper is to pay it; and on the other hand, the shipper must pay it unless and except when by the contract the carrier is to pay it.

It is submitted that the assertion of the right of the carrier by contract to exempt himself from the payment of the tax is a right, privilege or immunity within the meaning of Sec. 709 of the Revised Statutes; and that the denial by the State Court of the right of the plaintiff in error to exempt itself by contract from the burden of the tax gives this Court jurisdiction to review its decision.

In *Palmer vs. Hussey*, 119 U. S., 96, the highest Court of New York had granted a motion to perpetually enjoin the collection of a judgment obtained in a Court of the State on the ground of the discharge of the defendant in bankruptcy. This Court denied a motion to dismiss a writ of error to the State Court, holding that the claim set up by the plaintiff below that, by reason of the fraudulent and fiduciary character of his debt, it was exempt from the operation of the discharge in bankruptcy was a claim to an immunity within the meaning of Section 709 of the Revised Statutes.

In *Upshur vs. Briscoe*, 138 U. S., 365, a writ of error to review a similar decision was entertained.

In *Bronson vs. Rodes*, 7 Wall., 229, this Court reviewed on writ of error a decision of the Court of Appeals of New York to the effect that a tender of legal-tender notes was a good tender of payment under a contract providing for payment in gold or silver coin.

In *Parker vs. Davis*, 12 Wall., 457, jurisdiction was

exercised under the 24th section of the Judiciary Act to review a decision of the Supreme Court of Massachusetts holding the legal-tender acts constitutional.

In *Montgomery vs. Hernandez*, 12 Wheat., 129, it was held that the Supreme Court might rightfully exercise appellate jurisdiction to review the decision of a State Court in an action upon a marshal's bond where the Federal statute relating to such bonds provided that the action on them should be brought within six years from the time the action accrued, and the State Court edcided that the cause of action had accrued within six years.

II. The plaintiff in error in the State Court claimed an exemption from liability to be sued therein upon the cause of action set up.

It specially denied in its answer the jurisdiction of the State Court and in its petition for a writ of *certiorari* to the Supreme Court of Michigan again alleged the absence of jurisdiction in the State Court. It appears from the opinion of the State Court that it was specially claimed there that the Federal Courts had exclusive jurisdiction and that this claim was denied.

The claim to exemption from suit in the State Court was the claim of immunity under a Federal statute (to wit, Secs. 629, 711, R. S. U. S.), and the denial of the claim gives this Court jurisdiction to review the decision of the State Court.

Davis vs. Packard et al., 6 Peters, 41.

"It is not necessary that the record should state in terms that an act of Congress was in point of fact drawn in question. It is sufficient if it appears from the record that an act of Congress was applicable to the case and was misconstrued, or the decision in the State Court was against the privilege or exemption specially set up under the statute."

III. This proceeding is a "suit" within the meaning of Sec. 709 of the Revised Statutes which this Court has jurisdiction to review by writ of error.

In Weston vs. City Council, 2 Peters, 449, the Court said of the term "suit" used in Sec. 709 of the Revised Statutes (then Sec. 25 of the Judiciary Act):

"The term is a very comprehensive one, and it is understood to apply to any proceeding in a Court of Justice by which an individual pursues that remedy in a Court of Justice which the law affords him."

In that case an application for a writ of prohibition was reviewed by the Supreme Court on writ of error to a State Court.

In Hartman vs. Greenhow, 102 U. S., 672, this Court held that it had jurisdiction to review on writ of error mandamus proceedings in a State Court against a State Treasurer.

In McPherson vs. Blacker, 146 U. S., 1, the Michigan electors case, this Court again held that an application for a mandamus was a suit which it had jurisdiction to review on writ of error to a State Court.

In Boyd vs. Thayer, 143 U. S., 135, a proceeding in a State Court by *quo warranto* to determine the right to hold the office of Governor was reviewed on writ of error.

In Tinsley vs. Anderson, 171 U. S., 101, an application for a writ of *habeas corpus* was held to be a suit which might be reviewed on writ of error to a State Court.

IV. It is submitted, therefore, that the motion to dismiss the writ of error should be denied.

LEWIS CASS LEDYARD,
Of Counsel.

[13409]

BLEED. THROUGH POOR COPY

Supreme Court of the United States.

THE AMERICAN EXPRESS COMPANY,
Plaintiff-in-error,

against

FRED A. MAYNARD, Attorney-General of the State of Michigan, *ex rel.* GEORGE F. MOORE, *et al.*

BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR.

Statement.

The proceeding under review was brought by the Attorney-General of Michigan, on the relation of several merchants of Detroit, to procure a writ of mandamus requiring the American Express Company to accept for transportation all goods which should be tendered to it, and to deliver therefor a receipt bearing the one-cent stamp required by the War Revenue Act, without demanding or requiring the payment of the cost of such stamp by the shipper.

Although it appeared by the petition that the Company was largely engaged in interstate business (Record, pp. 2, 3, 4), the relief sought by the petitioner and granted by the Court (Record, pp. 6, 13), extended as well to the interstate

as to the local business of the Company. Indeed, one of the instances of refusal on the part of the Company to accept a package except upon the shipper's furnishing the cost of the stamp, upon which the petition proceeded, was in relation to a shipment from Michigan to Indiana (Record, p. 8).

Nor was the relief granted by the Michigan Court limited to the persons upon whose relation the proceeding was instituted. Its mandate ran in favor of all shippers or consignors who might tender goods for transportation. Indeed, it is only by implication that the benefits of the writ could be confined to shippers tendering goods within the State of Michigan (Reccord, p. 13).

The plaintiff-in-error, however, does not propose to dwell upon these features of the case. It is of importance to the Express companies, and to the public, that the real question underlying the Attorney-General's application, should be authoritatively determined by the decision of the Court—and we have no desire to weaken the discussion of that question by the introduction of matters which might have, indeed, an important bearing in the particular case before the Court, but which would not be helpful in reaching a conclusion upon the principal question involved.

The cause was heard in the State Court upon petition and answer (Record, p. 1)—and we must, therefore, take the averments of the answer as true. The position taken by the petitioner was that the War Revenue Act imposed upon the carrier the burden of paying the cost of the stamp required to be affixed to bills of lading, and that the exaction of this cost from the shipper constituted a violation by the carrier of the duty imposed upon it by the act (Record p. 4, § 10).

The plaintiff-in-error insisted that the act did not impose the burden of the tax upon the carrier, but left the question as to whether the carrier or the ship-

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per should bear it, a matter of adjustment between the parties (Record, p. 11, § 6).

It also claimed that it had a right to establish reasonable rules and regulations for the conduct of its business, and to fix such rates for its services as it deemed best, provided the same be not unreasonable (Record, p. 11, § 7)—that the passage of the War Revenue Act effected an important change of conditions, so as to make it necessary for the plaintiff-in-error to meet the change by the necessary alterations in its regulations and rates, to prevent its resources from being depleted and its financial condition from being weakened; that to this end "it raised its rates of transportation to an amount reasonable and just, and only necessary to meet the change of conditions made by said Act and save itself from great loss of revenue and profits," etc. (Record, p. 11, § 8).

It also alleged in substance that its requirement that the shipper should, in addition to the former rate, pay the cost of the stamp, was reasonable and just (Record, p. 12).

The tax in question is imposed by Section 6 of the War Revenue Act, which is as follows:

> "Section 6. That on and after the first of day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this Act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party, who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, re-

spectively or otherwise specified or set forth in the said schedule. * * *"

The clause of Schedule A, which fixes the amount of the tax is as follows:

"EXPRESS AND FREIGHT. It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached and canceled, as in this Act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: *Provided*, That but one bill of lading shall be required on bundles or packages of newspapers when enclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest, or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier, express company, or corporation or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest, or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid."

The Supreme Court of Michigan held that this clause imposed upon the carrier the burden of the tax. It said:

"The main question in the case relates to the construction to be placed upon the act in question.

"By the act, every express company is compelled to issue to every shipper or consignor, etc.,

a bill of lading for eacn shipment received for carriage, to which bill of lading and duplicate thereof there shall be attached and cancelled a stamp of the value of one cent. The law therefore imposes upon the carrier the obligation to issue the receipt. * * * This bill must be stamped and the stamp cancelled. It is evident that it is as much the duty of the company to place the stamp upon the receipt and cancel it as it is to issue the receipt. This duty is made more apparent by the fact that the act further provides that failure to issue the receipt makes the carrier so failing amendable to a heavy penalty.

* * * * "We are, therefore, led to the conclusion that the duty to issue the receipt and the penalty affixed for the failure to do so implies that it is to be a receipt which would bring the Government the revenue provided; therefore the act makes it the duty of the company to affix the stamp."

To the suggestion that if this be so, still the company has the right to raise its rates to meet the burden thus imposed, the Court answered:

"It is conceded that the effect of this is to throw the burden upon the shipper. It is apparent upon the face of this proceeding that the very purpose of this change in the regulations and the increase of rates is to avoid the payment of the tax, and thus cast upon the shippers the burden which the act of Congress puts upon the company. This is but an envasion and a subterfuge to avoid the terms of the act."

We submit that these rulings were erroneous.

POINTS.

First Point. The question is as to the construction of the statute; and that, of course, is in the last resort a question of language. There are, however, two or three considerations of a general character which have an important bearing upon the conclusion to be reached.

(*a*). The first of these relates to the *nature of the tax*.

It is of the essential nature of a documentary stamp tax, that the burden should become widely distributed. Such has been the history of taxes of this description whenever they have been imposed, and it has been found in practice that business and commerce speedily adjust themselves to that condition. They belong to the class recognized as *indirect taxes*, which Mr. Mill describes thus:

"Taxes are either direct or indirect. A direct tax is one which is demanded from the person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person, in the expectation and intention that he shall indemnify himself at the expense of another, such as the excise or customs. The producer or importer of a commodity, is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumer of the commodity, from whom it is supposed he will recover the amount by means of an advance in price."

Principles of Political Economy, Vol. II, p. 415.

This definition was approved by the learned Chief Justice in the Income Tax Case:

"Ordinarily," he said, "all taxes paid primarily, by persons who can shift the burden

upon someone else, or who are under no legal compulsion to pay them, are considered indirect taxes. * * *"

Pollock *vs.* Farmers' Loan and Trust Co., 157, U. S., 558.

It is this very quality of being readily and easily distributable that forms one of the principal recommendations of a stamp tax. Through such an imposition large revenues may be raised by the Government without the tax being felt by the people to be unduly burdensome. Its incidence is widely distributed, and the burden falls upon each individual so lightly that the weight is not appreciated. Hence, it is paid, if not with cheerfulness, at least with as near an approach to that feeling as ever accompanies the payment of a tax.

(*b.*) The view of the Supreme Court of Michigan is that Congress by the act in question has imposed the tax upon express companies, with an implied prohibition against their shifting the burden so as to make it fall upon their customers. Had Congress done the thing thus imputed to it, surely it would have transcended its constitutional powers; for such a tax imposed upon a given person with the intent and the effect that he alone shall bear its burden, without right to shift it upon someone else, is nothing but a *direct* tax, and one, therefore, which can be levied by Congress only under the limitation that it be apportioned among the States, according to population.

Moreover, how could such a prohibition he enforced? There may be cases in which from the nature of the tax it may be imposed upon the very person who must bear its burden. Perhaps an income tax is of that class. But where the

tax is imposed, as stamp taxes are, upon commercial transactions, would not a prohibition against shifting the burden be necessarily futile? It is of the nature of such taxes that the burden should be capable of being shifted. How it is shifted, and the extent to which the process is carried, are determined by the necessities of business and the laws of trade.

(*c*.) What reasonable motive or what justifiable purpose can be imputed to Congress in the enactment of such a law as the Supreme Court of Michigan construes this statute to be?

The raising of revenue is the object in hand. How is that aided by the requirement that he upon whom the tax is primarily laid must alone bear its burden? Is such a consideration within the legitimate purview of Congress? It may be, indeed it doubtless is, the duty of the Legislature in selecting a method of taxation, to adopt that which is most equitable, which involves the least hardship, and which carries with it a burden most easily borne. But this duty would be best fulfilled by the adoption of a tax, the burden of which should be most widely distributed among the greatest possible number, to the end that it should bear with the least possible weight upon each individual.

(*d*) Another consideration of importance in testing the correctness of the view taken of this statute by the Supreme Court of Michigan, is that courts should not lightly impute to the Legislature an intention to restrict the ordinary freedom of contract. Again and again have courts declared that if one thing more than another is required by sound public policy it is that freedom of contract should be left unimpaired. The prohibition which the

Michigan court reads into this act against the shifing of the burden by the carrier is a distinct limitation and impairment of the right of private contract, and the intention to impose it should not be imputed to Congress unless required by the plainest language.

(*e.*) The last general consideration to which we desire to call attention is one which is not confined to the particular kind of tax which is here involved, but is of general application in all cases in which it is claimed that a tax has been imposed.

It was thus formulated by this Court in a case arising under the former stamp tax act upon which the present act was framed.

" If there is a doubt as to the liability of an " instrument to taxation, the construction is in " favor of the exemption, because, in the lan- " guage of Pollock, C. B., in Girr *v.* Scudds, ' a " ' tax cannot be imposed without clear and ex- " ' press words for that purpose.' " (United States *vs.* Isham, 17 Wall. 496).

Such is the principle to be applied when the question is whether a tax has been imposed or not.

We submit that it applies with equal force when it is claimed that a tax which has been admittedly imposed upon a transaction has been in fact imposed exclusively upon one of the parties to such transaction.

Second Point.—Documentary stamp taxes are not designed to fall upon any designated person or class of persons.

The intention of the Legislature is to select

for taxation *transactions* which are of frequent occurrence and which are of such a nature that they are evidenced by documents.

They are the common transactions of ordinary commercial life, and as a rule they are of such a character that the document itself may be said to constitute the transaction; and so the law selects those commercial, financial or legal documents which are in most frequent use, and imposes a tax in respect of the transaction by requiring that a stamp shall be affixed to the document by which the transaction is evidenced, or which constitutes the transaction.

Running through the entire list of transactions mentioned in Schedule A, we find that, with a very few exceptions which will be presently noticed, they are all of such a character that it may be said that the document constitutes the transaction itself. This is true of checks, drafts, certificates of deposit, orders for the payment of money, bills of exchange, letters of credit, bonds, certificates of profits, certificates of damage, marine certificates, certificates required by law, charter parties, conveyances, telegraph dispatches, custom house entries, policies of life insurance, leases and agreements relating to land, mortgages and pledges, passage tickets, powers of attorney, proxies, marine and commercial protests and warehouse receipts. In each of these instances the thing taxed is the transaction; but the document to which the stamp must be affixed is the transaction itself. A tax upon the document is in fact a tax upon the transaction.

There are, indeed, certain exceptional cases in which the transaction intended to be taxed might take place without the creation or delivery of any document. Take the case of a sale of a certificate of stock where the delivery of the thing sold

consists merely in handing over a certificate of stock already assigned in blank by the holder. Here the transaction intended to be taxed is the transfer of ownership, and yet that may take place in the nature of things without any document to evidence it.

So, in the case of a sale or agreement to sell products or merchandise at an exchange or board of trade, there might be a mere verbal agreement of sale, followed by a delivery of the merchandise, and no written evidence of the thing intended to be taxed, viz., the sale, would exist.

In these two cases, therefore, the statute requires that a document capable of receiving a stamp shall be created, and accordingly directs that the seller shall make and deliver to the buyer a bill or memorandum of sale, or agreement to sell, and imposes a penalty upon any person making such sale without the creation of the requisite document.

And so in respect to the transactions of carriage which are intended to be taxed. What is intended to be reached here is every shipment accepted by a carrier for transportaton. It is not, however, in the nature of things, essential to a shipment of goods that it should be accompanied or evidenced by any writing. Here, therefore, as in the case of sales above referred to, the statute requires the only person who is capable of doing it to create and bring into existence a document evidencing the shipment and capable of receiving a stamp. This direction is contained in the "Express and Freight" clause which makes it the duty of the carrier to issue to the shipper, upon every accepted shipment, a bill of lading or other evidence of receipt and forwarding.

The purpose of this requirement is not to determine who shall pay the tax, or who shall affix

the stamp, but to make it the duty of the only party to the transaction who can do it to issue or create a document representing the transaction taxed, and capable of being stamped.

Third Point.—It is a singular circumstance that the Supreme Court of Michigan, while professedly engaged in the task of construing a statute imposing a tax, nevertheless throughout its entire opinion sedulously refrains from any comment upon the only section of the law which in fact imposes the tax!

After saying: "The main question in the case "relates to the construction to be placed upon the "act in question" (Record, p. 19), the Court proceeds to discuss the meaning, not of Section 6, which purports to impose the tax, but of the "Express and Freight clause" of Schedule A, which does not purport upon its face to impose any tax, but relates only to the method of collection and the determination of the amount of the tax imposed by Section 6.

Thus, ignoring the main enactment and considering only an incidental and administrative portion of the Statute, the Court arrives at the meaning of the Act by means of a process admirably well adapted to lead to an erroneous conclusion.

Omitting some of the words for the sake of making the sense more clear, section 6 provides as follows:

> "That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid, for and in respect of the several * * * things mentioned * * in Schedule A * * * by any person

* * * who shall make, sign or issue the same, *or for whose use or benefit the same shall be made, signed or issued*, the several taxes * * * specified * * * in the said schedule."

These are the only words in the act by which a stamp tax is imposed, or by which any duty to pay such taxes is imposed upon any one.

It is a clear and unambiguous enactment to the effect that all the stamp taxes upon documents mentioned in Schedule A shall be paid either (1) by the person who issues the document, or (2) by the person for whose use or benefit the same is issued.

This provision is in complete accordance with the general and essential nature of such taxes. As we have seen, they are not imposed upon any particular persons or occupations. They are taxes upon commercial and business transactions which are evidenced by, or which consist of, documents.

To each of such transactions there are of necessity two parties—one who makes or signs the document, and the other for whose use or benefit it is made or signed. The subject of the tax is the transaction. To the government, whose only object is revenue, it is a matter of absolute indifference whether the cost of the tax is borne by one party or the other.

Whether, in case of a lease, it is borne by lessor or lessee; in case of a mortgage, by mortgagor or mortgagee; of a draft, by drawer or drawee; of a sale, by vendor or vendee; of a power of attorney, by principal or agent; of a custom house entry, by importer or consumer—all this is a matter with which the government does not concern itself.

So in the case of transportation of goods. The two parties to the transaction are the carrier and

the shipper. The bill of lading or receipt is issued by the carrier for the use or benefit of the shipper; and whether the ultimate expense of the stamp shall be borne by one or the other is left to be determined by the operation of the ordinary laws of trade.

The act bristles with indications of this attitude of the government—its complete indifference as to which party to the transaction pays the tax.

See Section 10, which provides that any person who accepts or pays any bill of exchange, draft or order for the payment of money, without its being duly stamped, is equally guilty with the person who makes, signs or issues such a note unstamped. Section 11, too, requires the acceptor of a bill of exchange, drawn in a foreign country, but payable in the United States, before paying or accepting it, to place a stamp upon it, and provides that a person receiving or taking in payment any such draft without a stamp is equally guilty with the person who pays or negotiates or offers it in payment.

So, too, Section 9, which provides for the cancellation of the stamp, scrupulously avoids saying that the *person issuing* the document shall affix or cancel the stamp. The intent of the act, as shown by Section 6, is that either party may affix the stamp; hence, when Section 9 comes to provide for its cancellation, the person whose duty it is to cancel it is described not as the person who *issued* the document, but as the person "*using or affixing the stamp.*"

Fourth Point. Thus, the terms of Section 6, as well as other parts of the Act, leave it a matter of negotiation and contract between the parties which of them shall bear the burden of the tax.

An examination of the "Express and Freight Clause" of Schedule A will show that it not only requires no different construction, but that it is entirely consistent with this construction of the Act.

This clause first declares that it shall be the duty of every carrier to issue to the shipper from whom any goods are accepted for transportation, a bill of lading, manifest or other evidence of receipt and forwarding.

Then, separated by a semi-colon, follows the provision: "And there shall be duly attached and cancelled, as in this Act provided, to each of said bills of lading * * * a stamp of the value of one cent."

It is to be observed that it does not say *who* shall affix the stamp. The statute carefully employs the impersonal expression, "There shall be attached and cancelled."

Then comes the provision imposing a penalty upon the carrier for failure to issue such bill of lading.

The argument of our opponents, and of the Supreme Court of Michigan, is that here we have a requirement that the carrier shall issue a bill of lading; that such bill of lading shall be stamped; hence, it is the duty of the carrier to stamp it.

An argument which they find strengthened by the provision as to penalty. The bill of lading referred to, they say, is a complete and valid, *i. e.*, a stamped, bill of lading, and any failure by the carrier to issue such (*i. e.*, a stamped) bill of lading subjects him to a penalty. A penalty, therefore, being imposed upon him for not issu-

ing it, is it not plainly made his duty by the Act to issue it?

This argument involves a completely mistaken notion of the scope and purpose of this clause.

As we have already shown, its purpose is to require the carrier upon every transaction of carriage to issue or create a bill of lading capable of being stamped, to the end that each such transaction shall be evidenced by a document.

The penalty imposed is not for failure to issue a stamped bill of lading, but for failure to issue any bill of lading at all; that is, a failure to create the necessary document capable of receiving a stamp.

That this is the true meaning of the clause appears in many ways.

1. It is the meaning most consistent with its language.

2. It is the only meaning consistent with the provisions of Section 6 which imposes the tax indifferently upon the carrier or the shipper.

3. Apply to the clause the meaning which our opponents claim for it, and it results in nonsense. They say that the words "such bill of lading in the penalty clause mean 'stamped bill of lading.'" Translate the phrase accordingly, and we have this: "Any failure to issue (such) a *stamped bill* of lading as herein provided, shall subject such * * * carrier to a penalty of fifty dollars for each offense, and no (such) *stamped* bill of lading * * * shall be used in evidence *unless it shall be duly stamped* as aforesaid! Clearly, this effort at statutory construction is not very successful.

4. But compare this penalty clause with the provisions of Section 13 imposing a penalty for issuing a document required to be stamped

without a stamp being affixed thereto, and the demonstration becomes complete.

In the first place, the penalty is a very different one from that contained in Section 13. The former is merely a penalty of fifty dollars for failure to *issue* a bill of lading, and is imposed irrespective of the question of *intent*. It is the carrier's duty to issue or create the document so that it may be stamped, and no excuse that his failure was innocent and without design will be received.

The penalty imposed by Section 13, on the other hand, is a much more serious matter. It is the penalty which relates to an evasion of the tax.

A person who issues a document mentioned in Schedule A "without *the same being duly stamped, or having thereupon an adhesive stamp for denoting the tax chargeable thereon, and* canceled in the manner required by law." (Note the strict adherence to the impersonal form of expression.) "*With intent to evade the provisions of this Act*," is declared guilty of a misdemeanor, punishable by fine or imprisonment, or both.

This is a general provision applying to every document mentioned in Schedule A. It applies, therefore, to the bill of lading required to be issued by a carrier.

Clearly two such different consequences as the penalty provided in the "Express and Freight Clause," and this much more serious penalty provided in Section 13, cannot be intended to apply indifferently to one and the same offense.

Can anything more clearly denote the difference in the nature of the two offenses described in these two provisions, than this enormous difference in the resulting penalty?

The one, a mere failure to create a document, however inadvertent or innocent it may be, subjects the defaulting party to a penalty of fifty dollars.

This is because his performance of the duty of creating the document is the one essential condition necessary to the collection of the tax.

The other is the issue, with intent to evade the tax, of a document without a stamp. Naturally, this, a much more serious offense, being an intentional evasion of a tax, is visited with a much heavier penalty—fine, imprisonment, or both.

5. That the Supreme Court of Michigan took a wholly erroneous view of the meaning of the penalty provision of the Express and Freight clause is further shown by the discussion in Congress while its terms were under consideration there. Senator Gorman fell into the same error of supposing it to be a penalty for not stamping a bill of lading; but Senator Aldrich, who was in charge of the bill, exposed the error very clearly. The record shows the following:

"MR. GORMAN. * * * I read, beginning at line 10, on page 41;

'Any failure to issue such bill of lading, manifest, receipt or other memorandum shall subject such railroad company, carrier, express company, or corporation or person to a penalty of $50 for each offense.'

MR. ALDRICH.—The Senator from Maryland certainly misapprehends the language there or he has not read it carefully. *That is the penalty for not issuing a bill of lading.*

MR. GORMAN.—Yes.

MR. ALDRICH.—The penalty for not putting a stamp upon one when issued, is a penalty which is applied in another way.

MR. GORMAN.—But it is the same thing precisely.

MR. ALDRICH.—I beg the Senator's pardon. *That is simply a provision that every railroad company must issue a bill of lading, and failing to do that, it must pay a fine of $50.* As to what the penalty shall be for failing to stamp it after issue is another question entirely.

31 Congressional Record, p. 5627.

6. Most significant, too, is the provision in relation to newspapers, to the effect that but one bill of lading should be required on packages of newspapers when enclosed in one general bundle at the time of shipment.

This provision was inserted in the Express and Freight Clause, at the instance of a committee of newspaper publishers who represented to those in charge of the bill the enormous burden that would fall upon them if a bill of lading were required for every separate package of newspapers shipped by express. They insisted that without a limitation Congress would be imposing an undue burden upon the press. This was upon the theory, accepted on all sides during the debate on the bill, that the shipper would in fact have to bear the cost of the stamps.

31 Cong. Rec., pp. 6168–6172.

Fifth Point.—Were the true interpretation of the act such as was adopted by the Michigan Court, the statute would be unconstitutional. According to that interpretation a tax is imposed upon the carrier in respect of each shipment, with an implied prohibition against his shifting the burden of the tax upon others by adding the cost to the rates for transportation.

But it is to be observed that the tax is imposed upon *every* shipment, without regard to its interstate or domestic character. The prohibition, therefore, applies to all the business transacted by the carrier wholly within each State.

This would amount to a regulation by Congress of intratate or domestic commerce; for it would be an attempt by Congress to control the rate demanded by the carrier for services performed wholly within a State.

The fact that such a regulation is contained in a statute imposing a tax, would not avoid its illegality. A very great proportion of the instances in which this Court has overturned the action of States as constituting a regulation of interstate commerce have arisen upon statutes merely purporting to impose a tax.

As a State has no power, in any form, directly or indirectly, to enact a regulation of interstate commerce, or to impose a burden upon interstate commerce in any guise whatever, so the Congress has no power directly or indirectly to regulate domestic commerce or to impose any burden upon it.

Sixth Point. — The scrupulous care with which the statute employs the *impersonal* expression in every instance in which it speaks of

the affixing of the stamp is most significant. Such precision of language cannot be ascribed to chance or accident.

Section 6, as we have seen, lays the tax indifferently upon the person who issues a document or the person for whose use or benefit it is issued.

Section 7 imposes a penalty upon any person who issues a document, "*without the same being duly stamped.*" It does not say "without stamping the same."

Section 9 requires the stamp to be cancelled by "*the person using or affixing the same.*" It does not say "by the person issuing the document."

Section 10 imposing the penalty for evading the act by the use of unstamped documents says: "without *the same being duly stamped.*" It does not say "without stamping the same."

Section 13 imposes the penalty upon the person who registers, issues, sells or transfers a document mentioned in Schedule A, "*without the same being duly stamped.*" And all the provisions of Section 13 relating to relief against forfeiture are couched in equally impersonal form.

Section 18 prohibits telegraph companies from transmitting a dispatch "*without an adhesive stamp being affixed* to a copy thereof."

There are but two instances in which the act requires a particular person to affix the stamp upon a document mentioned in Schedule A. And these exceptional cases are very significant.

They are found in Sections 11 and 14. One is the requirement that the acception of a bill drawn in a foreign country, but payable in the United States, shall before paying or accepting the same "*place thereupon a stamp,*" etc. The other is the provision declaring that a bond or

certificate of stock issued in a foreign country shall pay a tax when issued, sold or transferred in the United States, and making it the duty of "the party to whom the same is issued, or by whom it is sold or transferred," to affix the stamp.

Evidently in these two cases, the act departs from the impersonal form and places the duty upon a given individual, because, as the instrument is created without the jurisdiction of the United States, the only effective way of collecting the tax is to require the person who first becomes a party to it within the jurisdiction to affix the stamp.

We have already commented on the use of the impersonal form in the express and freight clause. Perhaps it is more striking there than anywhere else, because of the sudden change of the phraseology.

"It *shall be the duty of every carrier* to issue to the shipper a bill of lading, *and there shall be duly attached and cancelled,* as in this act provided." (*i. e.*, by either carrier or shipper), to each of said bills of lading a stamp, etc. Surely if the meaning of Congress was that which the decision below imputes to it, this is an extraordinary way of expressing it.

How much easier and clearer to have merely continued the same form of expression and said: "It *shall be the duty* of every carrier *to issue* to the shipper a bill of lading, *and to attach and cancel,* etc.

Seventh Point.—There is no allegation in the petition that the plaintiff-in-error demanded an unreasonable compensation for transportation in

any of the instances mentioned in the petition. That was not the nature of the complaint made, and the mandamus granted by the Supreme Court of Michigan cannot be justified as a command to the carrier to carry for a reasonable hire.

The case presented by the Attorney General was founded upon an assumed interpretation of the War Revenue Act and upon a general line of policy adopted by the plaintiff-in error in view of the situation in which it found itself by reason of that enactment. It was in this light that the case was decided by the Court. (See concluding portion of opinion, Record p. 21.)

What the Court decided was, that the Act made it the duty of the carrier to pay the tax; and that the company could not be allowed to shift the burden by adding the cost of the tax to its charges, because this would amount to "an evasion and a subterfuge to avoid the terms of the Act." (Record, p. 20.)

We have already endeavored to show that the notion upon which the Court proceded was wholly erroneous, and that far from making it the duty of the carrier to pay the tax, even in the first instance, the act by its express terms left the question of who should pay a matter of negotiation between shipper and carrier, and that the whole scheme of the legislation was consistent with this view and this only.

We will now, however, concede, for the sake of argument, that it is made the duty of the carrier to pay the tax in the first instance, that is to affix the stamp.

When the War Revenue Act became a law the Express Companies found themselves confronted by a situation of much gravity. They were entirely willing to bear their fair share of the public burden imposed by the expenses of war.

Apart from the tax provided in the Express

and Freight Clause, there were many taxes imposed by the act which fell upon their business.

Like other persons and organizations engaged in important business transactions, indeed, perhaps to a peculiar extent by reason of the immensity of detail involved in their business, they were at once subjected to a large number of taxes, not very large or burdensome in any particular instance, but amounting in the aggregate to very considerable sums.

They draw an enormous number of checks, they purchase and sell securities; they issue money orders, and other commercial documents; they send a great number of telegraph messages; they issue certificates of stock; they make entries at the custom house; they take out policies of insurance—in short, there is hardly a document among those enumerated in Schedule A which is not in one way or another in more or less frequent use by them. Upon all these documents taxes are imposed. In some instances, the burden is directly shifted and distributed according to the ordinary and natural laws of trade already referred to; in others, the process, if it takes place at all, is less direct and apparent. It may, however, be fairly said that in the case of a general documentary stamp tax, the probability is that the burden is, through this process of distribution, ultimately borne by each individual somewhat in proportion to the volume and activity of his business, and thus the express companies would bear their share of the general burden.

Confronted with the tax upon bills of lading, they found that if they assumed the burden of this themselves, they would be subjected to a taxation infinitely greater than that laid upon any other class of the community. Their business consists, among other things, of the transportation of a great number of small packages. In

this respect, it is wholly unlike that of the railroads, which are included in the same clause, imposing a tax upon bills of lading. A tax of one cent upon each bill of lading issued by a railroad would, in the aggregate, amount to a very small sum as compared with a similar tax upon bills of lading issued by an express company. The average bulk of railway shipments is so much greater, and the aggregate number of them is so much less, upon a business yielding the same gross revenue, that the tax laid upon the railroad becomes multiplied many times over when applied to an express company.

We believe that the tax on bills of lading laid upon railroads has not been found unduly burdensome upon them. Indeed, it is for this season that the railroad companies have in general assumed the payment of it themselves.

In the case of the express companies, however, conservative estimates have placed it as amounting to *between thirty and fifty per cent. of their entire net revenues from the business of transportation.* Such a tax, of course, presented a situation of the utmost gravity. If ultimately borne by the companies themselves, it would amount to *an income tax* of from *thirty to fifty per cent.* It cannot be supposed that Congress, in enacting a general revenue law, selected this particular business for the imposition of a tax so enormously disproportioned in its burden to all others imposed by the same law.

If borne by the shippers, however, this great injustice would disappear. It would bear with but little hardship upon any one shipper, because of its general distribution; and even then the process of distribution might, and doubtless would, proceed until the number of persons participating in the burden would cause its weight to bear so lightly upon each as not to be felt at all.

There were two courses open to the plaintiff-in-error:

One was to increase its rates generally to such an extent as to enable it to recover the amount of the tax from the shipper.

To this, however, there was an objection. Under the arrangements generally prevailing between express companies and railroads, the former pay a certain proportion of their gross receipts to the railroad companies as compensation for the facilities furnished them. This proportion is ordinarily about forty per cent of the gross receipts from the express business.

In order, therefore, to make good to themselves the amount expended for the bill of lading tax by a general increase of rates, the express companies would be obliged to raise their rates nearly double the amount of the tax, since forty per cent of the increased rate would have to be paid to the railroads.

This method, then, would have resulted in placing upon the shipper a burden nearly twice as great as the tax.

The other course was to collect from the shipper the exact amount of the tax in each instance, not as an increase in the rate as such, but as the reimbursement of an expense, which would not be regarded by the railroad companies as a portion of the gross receipts upon which their percentage was to be reckoned. This method was just to the shipper, as it took from him no more than the exact amount of the tax.

It was accordingly adopted; and it is to the adoption of this policy by the plaintiff in error that the defendant-in-error objects.

Its entire legality can be shown in a few words.

1. The principle of the shifting and distritribution of stamp and other excise and indirect

taxes is consistent with and essentially incident to the nature of such taxes, and has been in operation whenever such taxes have been in force.

2. The plaintiff-in-error is a common carrier. It is not a corporation, but an unincorporated association, purely the creature of private contract, and without any privileges, franchises or duties, save such as are enjoyed by or imposed upon any individual pursuing the same business.

The only obligation which it is under is to carry for a reasonable compensation. What is a reasonable compensation is a question into which many elements enter; and it is not necessary to discuss them. It is sufficient to say that if at a given time and under given circumstances, its rates are reasonable, and then some additional burden is placed upon it, involving a greater expense to it in performing the duty of carriage, an addition to the former rate of an amount equal to such additional expense would still leave the rate reasonable.

3. There is no allegation that the rates demanded and received by the plaintiff-in-error prior to the passage of the War Revenue Act were unreasonable, or that they were for any cause open to complaint or objection. Indeed, the petition itself seems to affirm the reasonableness of the rates; for it alleges that the plaintiff-in-error "has substantially refused to discharge its duty as a common carrier, and has, to a material degree, suspended the exercise of its functions and franchises by refusing to take goods * * * for transportation at the *usual rates and upon the usual terms*, * * *

except upon the consent of the shipper to pay the said stamp tax," etc.

(Record, p. 6).

This is clearly an implied statement that the *usual* rates and the *usual* terms were reasonable, and that the only thing complained of was the exaction of the cost of the tax from the shipper.

On the other hand, the answer, which, as the cause was heard upon petition and answer, must be taken as true, alleges that the rates as increased to meet the expense of the tax were "reasonable and just."

(Record, p. 11).

4. The learned Court below was of the opinion that any increase in rates should have been made in some different manner than by the addition of one cent to the charge for each shipment.

"To add one cent to every charge for car-
"riage," they say, "bears upon its face evi-
"dence of the attempt to evade the act.
"Where the charge established was twenty-
"five cents, it is now twenty-six cents; where
"it was fifty cents, it is now fifty-one cents;
"where one dollar, it is now one dollar and
"one cent, and so on, adding just one cent to
"each charge. It cannot be that this was
"done because the charge was too low for each
"carriage, however long the distance, or how-
"ever weighty the article. The statement of
"this claim is its own refutation."

(Record, p. 20).

The learned Judge delivering the opinion, forgets, however, that the tax constitutes an additional burden, not upon the general business of

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the company, but *specifically upon each shipment*. Where it formerly cost a certain amount to carry a parcel for which twenty-five cents was a reasonable charge, it now costs the company just one cent more for the carrying of that specific parcel. Nothing could be clearer than that the added expense is upon each transaction of carriage, and, therefore, the only reasonable and just method in which to increase the carrier's charge, is to increase it with respect to each shipment by the exact amount of additional expense attaching to such shipment.

Last Point.—The judgment of the Supreme Court of Michigan should be reversed, with costs.

LEWIS CASS LEDYARD,
Of Counsel for Plaintiff-in-Error.

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No. 723

Brief of Motion for O. E. (on

In the Supreme Court of the United States

October Term, 1908

No. 723

FRED. A. MAYLAND, Attorney General of the State of Michigan, on Relation of [illegible] Moore, et al.,

Petitioners and Defendants in Error,

vs.

THE AMERICAN EXPRESS COMPANY and CHARLES F. REED,

Respondents and Plaintiffs in Error.

MOTION, NOTICE AND BRIEF

In behalf of Defendant in Error, on Motion to Dismiss Writ of Error.

O. E. WARNER,

Attorney for Defendants in Error.

WISNER & HARVEY,

Attorney for Plaintiff in Error.

SUTTER PRINTING CO., DETROIT, MICH.

In the Supreme Court of the United States.

FRED. A. MAYNARD, Attorney General of the State of Michigan, on Relation of GEORGE F. MOORE, *et al.*,

Defendant in Error,

vs.

THE AMERICAN EXPRESS COMPANY, and CHARLES F. REED,

Plaintiffs in Error.

Now comes the said defendant in error, by C. E. Warner, his attorney, and moves the court to dismiss the writ of error, and remand said cause to the Supreme Court of the State of Michigan, for the following reasons, to-wit:

1. In that this court has no jurisdiction to hear and determine said cause.

2. In that no federal question is involved in said cause.

3. In that the writ of error herein was granted under and in pursuance of the provisions of section 709 of the United States Revised Statutes, while said suit or proceeding in said court, did not involve or draw in question the validity or construction of any statute of the United States, or any right, title, privilege or immunity set up or claimed thereunder.

4. In that said suit or proceeding in said state court did not involve or draw in question the validity of any

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treaty or statute of the United States, or any authority exercised under the United States, or any right, title, privilige or immunity claimed under the constitution, or any treaty or statute of, or commission held, or authority exercised under the United States.

5. In that the proceeding is not a "*suit*" within the sense of section 709, U. S Revised Statutes, or a proceeding of such character as will authorize a review in this court.

C. E. WARNER,
Attorney for Defendant in Error.

In the Supreme Court of the United States.

FRED. A. MAYNARD, Attorney General of the State of Michigan, on Relation of GEORGE F. MOORE, *et al.*,
Petitioner and Defendant in Error,
vs.
THE AMERICAN EXPRESS COMPANY, and CHARLES F. REED,
Respondents and Plaintiffs in Error.

GENTLEMEN:

You will please take notice that the foregoing is a true copy of a motion duly filed in the above entitled court and cause; and that the same will be submitted to said court, at Washington, D. C., on the ~~30th~~ 12th day of ~~April~~ May, A. D. 1899.

You are herewith served with a copy of the brief of argument of the defendant in error upon said motion.

C. E. WARNER,
Attorney for Defendant in Error.

To MESSRS. WISNER & HARVEY,
Attorneys for Plaintiffs in Error.
Dated, Detroit, April 4th, A. D. 1899.

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In the Supreme Court of the United States.

FRED. A. MAYNARD, Attorney General of the State of Michigan, on Relation of GEORGE F. MOORE, *et al.*,
Petitioner and Defendant in Error,
vs.
THE AMERICAN EXPRESS COMPANY and CHARLES F. REED,
Respondents and Plaintiffs in Error.

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

BY C. E. WARNER.

This is a motion to dismiss the writ of error in the above cause, upon the ground that the suit or proceeding in the Supreme Court of the State of Michigan, to which the writ of error issued, did not *involve* or *draw in question* the validity of any statute of the United States, or any authority exercised thereunder, or any title, right, privilege or immunity claimed under the constitution, or any statute of the United States, whereby an appeal might be taken to this court.

At the outset, we may state that the plaintiff in error applied to the Chief Justice of the Supreme Court of the

State of Michigan, for a citation, when said Chief Justice referred the matter to the entire court, composed of the five judges of said court, when said citation was denied, upon the ground that no federal question was involved.

Plaintiff in error thereupon applied to one of the justices of this court, when the writ was granted, without, we assume, any particular investigation or consideration of the question as to whether or not the writ would properly issue.

STATEMENT OF THE CASE.

Plaintiff in error, the American Express Company, is a joint stock association, organized and existing under the laws of the State of New York, and was, and is, a common carrier, transacting the express business, and engaged in the business of receiving, carrying, forwarding and delivering goods, wares and merchandise, by express, for hire, from point to point throughout the various states and territories of the United States.

It maintained offices and did business in the State of Michigan.

It was an express company within the meaning of Schedule A of an act entitled an "Act to provide Ways and Means to meet War Expenditures, and for other Purposes," approved by the Congress of the United States, on June 13th, 1898.

This act provided among other things, that "it shall be the duty of every * * * express company, or corporation, or person, whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transporation, a bill of lading, manifest or other evidence of receipt and forwarding, for each shipment received for carriage and

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transportation, whether in bulk or in boxes, bales, packages, bundles, or not so enclosed or included, and there shall be duly attached and canceled, as in this act provided, to each of said bills of lading, manifests or other memorandum, and to each duplicate thereof, *a stamp of the value of one cent*, provided, &c."

While this act imposed the duty upon the express company, as contended by relator, to issue the receipts or bills of lading, and to attach the revenue stamp, yet the company refused to *accept goods for transportation*, unless the shipper or consignor should himself provide the stamp or pay for the same.

The petitioner, therefore, as Attorney General of the State of Michigan, upon the relation of the several persons mentioned in the petition, originally filed a petition in the circuit court for the County of Wayne, in proceedings in the nature of *mandamus*, wherein the petitioner prayed for an order, commanding the express company, and its agents and servants to receive, accept, transmit and deliver all such goods, wares and merchandise, as might be tendered to it when the fees and charges for such goods were paid, and to issue to the shipper or consignor a bill of lading, manifest or other evidence of receipt and forwarding, *with the stamp duly attached thereto, and canceled by it.*

An order to show cause was duly entered by said court, and the respondents thereupon appeared and filed an answer, and the cause or proceeding came on for hearing in due course before said court, when an order was entered and a mandamus issued in accordance with the prayer of the petition.

Inasmuch as the record herein is not yet printed, we take the liberty of appending hereto a copy of the petition, answer and order, which are marked Exhibits "A," "B" and "C," respectively.

Upon such order being granted, the plaintiffs in error herein, applied for a writ of *certiorari* from the Supreme Court of the State of Michigan, and the case was thereupon certified by the court below, to such court.

The cause came on for hearing before the supreme court in due course, when a decision was rendered affirming the decision of the court below.

The decision of the Supreme Court of Michigan may be found in 77 N. W. Rep., p. 317.

From this decision, plaintiffs in error, as above stated, first applied to the Chief Justice of the Supreme Court of the State of Michigan for a citation, upon writ of error from this court, when said Chief Justice took the advice of the remaining members of the court, and thereupon denied the application for such citation, on the ground that no federal question was involved.

Plaintiffs in error thereupon secured the writ of error from this court.

ARGUMENT.

I.

It is contended that the suit or proceeding in the State Court did not involve or draw in question the validity of the statute in question, or any authority exercised under it, or any title, right, privilege, or immunity claimed under the constitution or any statute of the United States, and that the writ of error should therefore be dismissed.

Whether the proceedings in the State Court drew in question the validity of the aforesaid statute, *depended upon the pleadings in said cause*, and we submit that when such pleadings are examined, and particularly the

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answer of the respondent, it will clearly appear that the validity or construction of such statute or any right thereunder, was not involved. The respondent substantially admitted or conceded the obligation upon its part, to primarily pay the tax, but contended that upon such payment, it had the right to raise its rate for transportation by the amount of such stamp tax.

This question, we submit, involved purely the common law right of the express company to raise or regulate its rates for transportation, and did not therefore involve either the validity or construction of the statute in question.

Let us therefore examine the answer to determine what issue was raised by it.

We give such parts of the answer as have a bearing upon the question:

(a) That under the terms of the Act of Congress, properly construed, it is not made respondent's duty to pay said tax, only when some party who would be a shipper, mutually agrees with respondent to enter into the relation of shipper and carrier; and said party has tendered for shipment some article to be carried by defendant, which it has accepted for that purpose, then and only then, is respondent liable under said Act to provide and attach said stamp. Ans., Par. 3.

(b) That it is the policy of all taxation laws under this government, that such burdens imposed thereby, shall be as generally and equitably distributed as is possible, in order that said tax burden may be cast upon the many, as a small burden, rather than it should be a larger one cast upon the few. *That in the Act, Congress seems carefully to have refrained from providing, as between shipper and carrier, which shall bear the burden of the tax, thereby evidently intending to leave it a matter of adjustment by the parties, with the stringent condition, however, that*

if their necessities require them to enter into the business relation of shipper and carrier as a condition precedent to their acting as such, the tax must be paid. Par. 6.

(c) That respondent, regularly organized and existing under and by virtue of the laws of New York—and acting under regularly issued license of this state--by it organization and compliance with the laws of this state as admitted in paragraph 5 of said petition to have been done, *became vested with the right to exist in a corporate capacity, and to regulate the carrying on of its business by reasonable rules and regulations, and to fix and insist upon the payment of such rates of transportation as it deems best, provided the same are not unreasonable in amount nor in manner of payment."* Par 7.

(d) That the enactment of the stamp act referred to, being an important change in the then condition of things, it became necessary for respondent to change and regulate its method of transacting its business and to re establish its rates of transportation, so that it might meet that change in a way to prevent its resources from being so depleted as to weaken its financial condition.

Respondent, therefore, decided to raise and did raise its rates of transportation to an amount reasonable and just and only necessary to meet the change of conditions made by said act, and save itself from great loss of revenue and profits as compared with its earnings before the passage of said act. And respondent submits and asserts that it had the full and perfect right to make such change in its method of transacting its business and in its former rates for transportation. Par. 8.

(e) That under its right to regulate its manner of doing business and regulating its rates, and with a view, as far as possible under the circumstances, of accommodating the public so far as paying said increase of rates, respond-

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ent has accorded to responsible shippers, the right to pay such increase (either using a stamp or money for the purpose) upon delivery of the goods, and the privilege of paying the balance of the rate of transportation at the point of delivering to the consignee. (Par. 9.)

(f) That respondent admits that *the regulation of its business affairs and change in its rate of transportation as above stated, in effect throws the burden of the said tax upon the shipper by force of circumstances, and that such effect is in accordance with the principle of taxation before referred to, that the burden should be distributed equitably among the many rather than be cast upon the few.* * * * *

(g) Therefore respondent submits that it has not been guilty of any violation of its duty as common carrier, that the effect of so doing throws the burden of tax upon the shipper, does not in any way lessen, or limit, or interfere *with the respondents' right to manage its business and regulate its rates of charge and that the changes made in that regard are reasonable and proper.* Par. 10.

It will be noted, therefore, that the express company did not, by its answer, draw in question the validity of the statute aforesaid or its construction. *It placed itself squarely upon its right, in view of the act, to regulate its rates of transportation.* This involved purely a common law right or privilege, and no right, title, privilege, or immunity by virtue of the statute.

The company practically recognized that the stamp tax was primarily imposed upon it, and that such stamp tax "*made it necessary for respondent to change and regulate its methods of transacting its business, and to re-establish its rates of transportation.*"

Surely if the law in question imposed the obligation

upon the shipper, or if the company so contended, and insisted upon the performance of this obligation by the shipper, then there would have been no occasion for the company to "*change and regulate*" its method of transacting its business, Not paying the tax itself, there would be no occasion for it to raise its rates by the amount of such stamp tax.

The company says, in its answer, that *such regulations and re-establishment* "throws the burden of the said tax upon the shipper by force of circumstances, and that such effect is in accordance with the principle of taxation before referred to."

The contention, therefore, did not involve the validity or construction of a statute of the United States, or a right, title, privilege or immunity set up or claimed thereunder; but, on the contrary, involved only the common law right of the express company, as a common carrier, to regulate its rates by imposing increased burdens upon shippers, in view of the tax which the act of congress had imposed upon it.

Error will not lie to a state court, unless a Federal question was actually raised and decided, *or necessarily involved in its judgment.* It is not enough that a Federal question might be raised.

See *Hagar vs. California, 154 U. S., 639.*
Crowell vs. Randall, 10 Pet., 368.
Edwards vs. Elliott, 21 Wall., 532-558.
Eustis vs. Bolles, 150 U. S., 361.
Murdock vs. Memphis, 20 Wall., 590.
Cook Co. vs. Calumet, &c., Co., 138 U. S., 635.
Wade vs. Lauder, 165 U. S., 624.
Harrison vs. Morton, 18 Sup. Ct. Rep., 742-5.

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In the case at bar, the express company specifically set up and claimed its right to raise and regulate its rates for transportation.

Had the law imposed the obligation to pay the tax upon the shipper, then there would have been no occasion to raise and regulate its rates. Upon the other hand, had the law imposed the obligation upon the express company itself, then there was involved the question as to the right of the express company to regulate and raise such rates for transportation, and this was the question which was distinctly presented to the court below for determination. This did not set up or involve any Federal question, *but was a distinct and independent question*, and therefore fell within the rule of the cases cited, *supra*.

In order to appeal to this court the decision of the state court must have been "against the title, right, privilege, or immunity *specially set up or claimed*."

Respondent did not *set up* or *claim* any right, title, privilege, or immunity by force of the statute. It contended purely and simply that it had the right, *as a common law right*, to raise and regulate its rates.

The rule as laid down by this court is strict. The Federal question must be necessarily involved in the judgment of the state court. Even though a Federal question was involved and decided by the state court, yet where such court also decides against the plaintiff, upon an independent ground, not involving a Federal question, the writ of error will be dismissed without considering the federal question.

Rutland R. Co vs. Central Vt. R. Co., 159 U. S., 630.

It has been held by this court that a simple *construction* of a state statute, or of an Act of Congress, in a terri-

tory, will not confer upon this court authority to review the action of the state court.

Linford vs. Ellison, 155 U. S., 503.

In the latter case it was held that in order to give this court jurisdiction, the validity of a patent or a copyright must have been involved, *or the validity of a treaty or statute of, or an authority exercised under the United States, must have been drawn in question.*

True, this latter decision applied to an Act of Congress in the Territory of Utah, but the language of the statute granting the right to take writ of error to this court, is substantially the same as that involved in *section 709, supra*, in so far as it applies to the validity of a treaty or statute, or any authority exercised under the United States.

The only other clause of section 709, which would seem to have any application to the controversy, is the clause providing that "where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity, specially set up or claimed." But as we have seen, this right, title, privilege or immunity *must be specially set up or claimed;* and we submit that it is not so claimed or made an issue by the answer.

In the late case of *Kipley vs. People of Illinois*, 18 Sup. Ct. Rep., 550, this court decided that when the jurisdiction of this court is invoked for the protection against the final judgment of the highest court of the state, of some title, right, privilege or immunity, secured by the constitution or laws of the United States, it must appear expressly or by necessary intendment from the record,

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that such right, title, privilege or immunity was "*specially set up or claimed*" under such constitution or laws.

The court say:

> "*Our jurisdiction cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case up intended to assert the Federal right.*"
>
> *Oxley Stave Co. vs. Butler Co., 166 U. S., 648.*
>
> *Levy vs. Superior Court, 167 U. S., 175.*

In *Muse vs. Arlington Hotel Co., 18 Sup. Ct. Rep., 109-111*, this court say:

> "As ruled in *Ansbro vs. U. S., 159 U. S., 695-697*, a case may be said to involve the construction or application of the constitution of the United States, when a right, title, privilege or immunity is claimed under that instrument, *but a definite issue in respect to the decision of the right must be distinctly deducible from the record*, before the judgment of the court below can be reviewed on the ground of error in the disposition of such a claim by its decision."

In *Oxley Stave Co. vs. Butler Co., supra*, this court say:

> "The words "*specially set up or claimed*" imply that if a party intends to invoke for the protection of his rights, the constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so declare, and unless he does so declare specially, that is unmistakably, this

> court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character, that the purpose of the party to assert a Federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the Circuit Court of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred affirmatively from the facts stated." * * * "Upon like grounds, the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, *but only from averments so distinct and positive as to place it beyond question that the party bringing the case here from such court intended to assert a right.*"

This opinion was cited and adopted in the case of *Union Mut. Life Ins. Co. vs. Kirschoff*, *18 Sup. Ct. Rep., 260.*

In U. S. vs. Lynch, 137 U. S., 280, this court holds that the validity of a statute was not drawn in question every time rights claimed under such statute were controverted; nor was the validity of an authority, every time an act done by such authority was disputed.

The court say:

> "The validity of a statute, or the validity of an authority, is drawn in question when the existence or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry."

See, also, *Railroad Co. vs. Hopkins, 130 U. S., 210.*

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South Carolina vs. Seymour, 153 U. S., 353.

Snow vs. United States, 118 U. S., 346-353.

District of Columbia vs. Gannon, 130 U. S., 227.

The respondent, by its answer, has in fact practically disclaimed any reliance upon the statute for its right to regulate its rates.

By paragraph 6 it says, that in the act, Congress seems carefully to have refrained from providing, as between shipper and carrier, which shall bear the burden of the tax, thereby intending to leave it a matter of adjustment by the parties, with the stringent condition, however, that if their necessities require them to enter into the business relation of shipper and carrier, as a condition precedent to their acting as such, the tax must be paid.

Where, therefore, let us ask, has the respondent *set up or claimed* any title, right, privilege or immunity under a statute of the United States, or where is the validity of a statute drawn in question?

None can be found in the answer of the respondent. The contention is based solely and exclusively upon its right to regulate its manner of doing business, and to regulate and re-establish its rates ond charges. This is purely a question, arising under the laws of the State of Michigan, not involving a federal question, federal statute, or any right, title, privilege, claim or immunity under a statute of the United States.

II.

We submit further, that the case is not of that character which will authorize a review in this court under the *U. S. Revised Statutes, Sec. 709.*

The proceeding in the state court was by *mandamus*, not to enforce the collection of a judgment, but to enforce the obligation of the Express Company to *accept* for transportation goods which might be tendered to it for that purpose.

The Act of Congress provides for review of a final judgment or decree "*in any suit*" in the highest court of the state.

The proceeding in question would not seem to be of that character which is contemplated by the statute in question. Sec. 1000 of the U. S. Revised Statutes, which provides for a bond in cases of this character, apparently contemplates cases involving a *money judgment.* No money judgment is involved in the proceeding at bar. No better case can probably be found for an illustration than the case at bar.

An order was originally entered in the State Court, granting a writ of mandamus on Sept. 16, 1898. The defendant took a writ of *certiorari* to the Supreme Court, which operated as a stay of proceedings, and from the decision of the State Court, a writ of error was issued from this court, which operates under the bond, as a further stay.

Now, in the face of the decision in the lower court, the respondent has continued, and still continues, to exact the payment of the stamp tax by the shipper, and the at-

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torney general and the citizens of the State of Michigan, whom he represents, are practically remediless.

We are aware that this court has held, in some cases, that an order awarding a peremptory writ of *mandamus* is a final judgment in a civil action, within the meaning of that term, as used in the statute regulating writs of error.

Davies, Collector, vs. Corbin, 112 U. S., 36.
Hartman vs. Greenhow, 102 U. S., 672.

But in these cases, the mandamus was a proceeding practically to enforce the payment of a judgment. Such cases partake of the nature of an execution to enforce the collection of the judgment, and can only be got by instituting an independent suit for that purpose.

Davies vs. Corbin, Supra.

In *Bath Company vs. Amy, 13 Wall., 244*, it was held that the *circuit courts* of the United States are not authorized to issue writs of mandamus as an original proceeding, nor at all, except when necessary for the exercise of their respective jurisdictions.

Mr Justice Strong says:

> "While it may be admitted that *in some senses* the writ of mandamus may properly be denominated a suit at law, it is still material to inquire whether it was intended to be embraced in the gift of power to hear and determine all suits at common law, of a civil nature, conferred by the judiciary act." * * * "Were there nothing more in the judiciary act than the grant of general authority to take cognizance of all suits of a civil nature at com-

> mon law, it might well be doubted whether it was intended to confer the extraordinary powers residing in the British Court of King's Bench to award prerogative writs. All doubts upon this subject, however, are set at rest by the 14th section of the same act, which enacts that circuit courts shall have 'power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, *which may be necessary to the exercise of their respective jurisdictions*, and agreeable to the principles and usages of law.'"

It will be seen, therefore, that the jurisdiction in mandamus cases is awarded to the circuit courts, not because the proceedings is a "*suit at law*" but because the 14th section provides that they shall have power to issue all writs *which may be necessary to the exercise of their respective jurisdictions.*

In *County of San Mateo vs. Southern Pacific R. Co.*, 13 F. R.. 145, Mr. Justice Field held:

That the term "*suits of a civil nature*" used in the act of 1875, providing for the removal of causes from the state court into the circuit courts, are less comprehensive than the term "cases" in the fourteenth amendment of the Federal constitution, as the latter may embrace proceedings not usually nor strictly termed suits.

The cases which have come under our observation in which it has been held that this court might review proceedings of this character, are cases in which mandamus has been issued by the circuit courts while "*in the exercise of their respective jurisdictions*," while the suit at bar was a proceeding not according to the course of the common law; not in the nature of an execution to enforce the

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collection of a judgment; not like a creditor's bill which is resorted to in aid of execution ; not in any manner involving the payment of money, but upon the contrary, a suit to enforce the obligation of the express company, as a common carrier, to receive, accept and transmit packages tendered to it.

We submit, therefore, that the writ of error should be dismissed.

C. E. WARNER,
Att'y for Def'ts in Error.

EXHIBIT A.

PETITION FOR MANDAMUS.

THE CIRCUIT COURT FOR THE COUNTY OF WAYNE.

TO THE CIRCUIT COURT FOR THE COUNTY OF WAYNE.

The petition of Fred A. Maynard, Attorney General of the State of Michigan, at the relation of George F. Moore, Ransom Gillis, Charles Buncher, Frank S. Munger, Abram P. Sherrill, and James S. Meredith, as survivors of themselves and James L. Edson, deceased, composing the firm of Edson, Moore & Co.; Henry A. Krolik and Herman Krolik, composing the firm of A. Krolik & Co.; William H. Strong, James L. Lee, Hal. W. Glover and George R. Treble, composing the firm of Strong, Lee & Co.; James W. Fales and William J. Fales, composing the firm of J. W. Fales & Co.; James K. Burnham, Albert H. Munger, Frederick C. Stoepel, Joseph J. Crowley and James Wilson, composing the firm of Burnham, Stoepel & Co., and the American Harrow Co., a body corporate, respectfully represents:

1. That the American Express Company, the respondent herein, is a joint stock association, organized and existing under the laws of the State of New York, and having its principal business office located in the City of New York, in said State.

2. That said company is a common carrier, transacting the express business, so-called, and is engaged in the business of receiving, carrying, forwarding, and delivering goods, wares and merchandise, by express, for hire, on behalf of all persons who may see fit to require its services, from point to point, throughout the various states and territories of the United States, and particularly from point to point in the State of Michigan.

3. That on the 29th day of January, A. D. 1897, said

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company had four hundred and eighty-nine (489) agencies or places of business in the State of Michigan alone, at which agencies or places of business, said company received goods, wares and merchandise, in boxes, bales, packages, bundles or otherwise, for transmission or transportation, for hire, to various points in the State of Michigan, and throughout the United States, and was then, and still is, a common carrier, holding itself out to the public as authorized to receive, carry and deliver such boxes, bales, packages, or bundles, &c.

4 That the business of the said company was and is large and lucrative, and that by the annual report of said company, filed in the office of the State Treasurer of the State of Michigan, on the 29th day of January, 1897, the said company then represented that its business was represented by one hundred and eighty thousand (180,000) shares, and that the working fund of the association was fixed at five million, three hundred thousand dollars, ($5,300,000,) and that the amount of their gross receipts on their current business, in the State of Michigan, for the year ending December 31st, 1896, was the sum of one hundred thirty thousand, four hundred fifty nine and 25-100 dollars, ($130,459.25,) and that said statementrepresents, substantially, as petitioner is informed and believes, the situation and condition of said company at the present time.

5. That Chapter 103, of Howell's Statutes of the State of Michigan, provides that it shall not be lawful for any person or persons to act within this state, as agent or officer, in transacting the express business, or the fordwarding of packages or parcels by express, for any company, association or individual, without first procuring a certificate of authority or license from the State Treasurer of this State, and before obtaining such certificate, such company, association, individual, agent or agents, is required to furnish to the State Treasurer of the State of Michigan,

annually, in the month of January in each year, with a statement, under oath, of the president, treasurer, secretary or general agent of such company, association or individual, showing:

First. The name and locality of the company or association.

Second. The amount of its capital stock, and how much is paid upon such stock.

Third. The number of agencies or places of business of said company in this state.

Fourth. The amount of gross receipts on their current business in this state, for the year ending December 31st, next preceding such report.

And the said express company, association or firm, corporation or individual, complying with the requirements of said act, and receiving a certificate or license from the State Treasurer of the State, was, and is, by said act, permitted to do business freely in any part of the state.

6. And your petitioner represents, upon information and belief, that the said American Express Company, respondent, has substantially complied with the terms and provisions of said act, and thereupon received a permit and license to do business in the State of Michigan; and, in pursuance thereof, is authorized to do business in said state, and to receive, accept and transmit packages from point to point, throughout the United States; and your petitioner represents that it is the duty of the said respondent to so receive, accept and transmit said packages, when duly offered or tendered to it for that purpose, and the charges thereof paid or tendered.

7. That the business of said company is of a public or quasi public character, and a public function used and exercised by said company for the people at large throughout the State of Michigan, as well as other states of the United States, and in which the public has a substantial

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interest, and the abuse or misuse of which is of a substantial nature.

8. That the persons, at whose relation this proceeding is instituted by the Attorney General of the State, constitute a portion of the people of the State of Michigan, and the public at large; and that the refusal of the respondent to receive, accept and transmit goods, wares and merchandise, as hereinafter more particularly stated and represented, constitutes but a few out of many cases of like character, and are presented for the purpose of representing the uniform course and practice of the respondent company.

9. Your petitioner further represents that on June 13th, 1898, the Congress of the United States passed an Act entitled:

"An Act to Provide Ways and Means to meet War Expenditures, and for other Purposes;" and that said Act, among other things, provides:

"Express and Freight. It shall be the duty of every railroad or steamboat company, carrier, express company or corporation, or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk, or in boxes, bales, packages, bundles, or not so enclosed or included; and that there shall be duly attached and canceled, as in this Act provided, to each of said bills of lading, manifest or other memorandum, and to each duplicate thereof, a stamp of the value of one cent; provided, that but one bill of lading shall be required on bundles or packages of newspapers when enclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest or other memorandum, as herein provided, shall subject such

railroad or steamboat company, carrier, express company or corporation, or person, to a penalty of fifty dollars for each offense, and no such bill of lading, manifest, or other memorandum shall be used in evidence, unless it shall be duly stamped as aforesaid."

10. That by reason of a desire of the respondent to avoid the payment of the stamp tax so called, and to impose such obligation upon the shipper, the respondent herein refuses to accept any goods for transportation, unless such shipper attaches the stamp to the said bill of lading, manifest or other evidence of receipt and forwarding for each shipment, or furnishes the money and means for that purpose to the said company, and that the said company thereby not only avoids its duty, under said Act of Congress, to pay and bear its proportion of the revenues to meet war expenditures, as provided by said Act, but violates its duty as a common carrier to receive, accept, transport and deliver such goods, wares and merchandise, so offered and tendered to it for that purpose; and in support thereof, your petitioner represents:

(a) That on the 1st day of July, A. D. 1898, the firm of Edson, Moore & Co., as hereinbefore mentioned, presented, tendered and offered a box, bale, package, bundle or parcel, to said express company for shipment and transportation, and that said company refused to receive, accept, ship and transport the same, or to issue to the said shipper a receipt therefor, unless a stamp, of the value of one cent was paid or provided by said Edson, Moore & Co.

(b) That on the 1st day of July, A. D. 1898, the firm of A. Krolik & Co., as hereinbefore mentioned, presented, tendered and offered a box, bale, package, bundle or parcel to said express company for shipment and transportation, and that said company refused to receive, accept, ship and transport same, or to issue to the said shipper a

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receipt therefor, unless a stamp of the value of one cent, was paid or provided by said A. Krolik & Co.

(c) That on the 1st day of July, A. D. 1898, the firm of Strong, Lee & Co., as hereinbefore mentioned, presented, tendered and offered a box, bale, package, bundle or parcel to said express company for shipment and transportation, and that said express company refused to receive, accept, ship and transport the same, or to issue to the said shipper a receipt therefor, unless a stamp of the value of one cent was paid, or provided by said Strong, Lee & Co.

(d) That on the 2nd day of July, A. D. 1898, the firm of J. W. Fales & Co., as hereinbefore mentioned, presented, tendered and offered a box, bale, package, bundle or parcel to said express company for shipment and transportation, and that said company refused, to receive, accept, ship and transport the same, or to issue to the said shipper a receipt therefor, unless a stamp of the value of one cent was paid or provided by said J. W. Fales & Co.

(e) That on the 7th day of July, A. D. 1898, the firm of Burnham, Stoepel & Co., as hereinbefore mentioned, presented, tendered and offered a box, bale, package, bundle or parcel to said express company for shipment and transportation, and that said company refused to receive, accept, ship and transport the same, or to issue to the said shipper a receipt therefor, unless a stamp of the value of one cent was paid or provided by said Burnham, Stoepel & Co.

(f) That on the 2nd day of August, A. D. 1898, the American Harrow Co., a body corporate, as hereinbefore mentioned, presented, tendered and offered a box, bale, package, bundle or parcel to said express company for shipment and transportation, and that said company refused to receive, accept, ship and transport the same, or to issue to the said shipper a receipt therefor, unless a

stamp of the value of one cent, was paid or provided by said American Harrow Co.

11. As before stated, your petitioner represents that the above and foregoing constitute but a few of many instances of like character, and that it is the uniform course and practice of the said respondent to refuse to receive, accept, transport, carry and deliver such goods, wares and merchandise, in boxes, bales, packages, bundles or otherwise, unless the said stamp tax is paid, or provided by said shipper.

12. Your petitioner represents that the said American Express Company, respondent herein, has substantially refused to discharge its duty as a common carrier, and has to a material degree, suspended the exercise of its functions and franchises by refusing to take goods, wares and merchandise in boxes, packages, bales, parcels, &c., which have been offered and tendered to it at its places of business and agencies in the city of Detroit, for transportation at the usual rates, and upon the usual terms, and has refused to accept and transport a great part of the goods, wares and merchandise duly offered and tendered to it, except upon the consent of the shipper to pay the said stamp tax so-called, whereby great loss and damage has accrued to the people of the State, and the trade and commerce of the people of the State is greatly injured by the refusal and neglect of said respondent company to perform its duties of carrier, unless the stamp tax so-called is paid by the shipper and consignors so tendering such goods to said company for transportation.

Your petitioner therefore prays that a peremptory mandamus may issue to the said The American Express Company, and Charles F. Reed, the local agent thereof, respondents, and to its officers, agents and servants, commanding it and them to receive, accept, transmit and deliver any and all goods, wares and merchandise duly of-

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fered or tendered to it, in boxes, bales, packages or bundles, or not so enclosed or included for transportation, when the fees and charges for such goods are paid, offered or tendered to said company, and to issue to the shippers or consignors throughout the State of Michigan, or their agent or agents, or persons from whom any such goods are received for transportation, a bill of lading, manifest or other evidence of receipt and forwarding for each shipment received for carriage and transportation, with the stamp duly attached thereto and canceled by it, as provided by the Act of Congress hereinbefore mentioned, and without demanding or requiring of such consignors or shippers the said stamp, or the value thereof.

(Signed,) FRED A. MAYNARD,
Attorney General of the State of Michigan.
WARNER, CODD & WARNER,
Attorneys for Petitioner.

The above petition was duly verified, and affidavits in support of it duly attached.

EXHIBIT B.

ANSWER.

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE.

FRED A. MAYNARD, *Attorney-General, etc.*, On the relation of George F. Moore, Ransom Gillis, Charles Buncher, Frank S. Munger, Abram P. Sherrill and James S. Meredith, as survivors of themselves and James L. Edson, deceased, composing the firm of Edson, Moore & Co. *et al.*, *vs.* THE AMERICAN EXPRESS COMPANY.	No. 38,638.

The answer of the American Express Company, respondent, to the petition of the Attorney-General of the State of Michigan, in the above entitled cause, and the order of this Court commanding it to show cause on the 8th day of August, inst., why the prayer of said petition should not be granted, respectfully shows:

1.

That the allegations of fact in paragraphs 1, 2, 3 and 4 are true as stated, except that part of paragraph 4 which alleges that "the statement of respondent's business, as shown by its report filed with the State Treasurer January 29th, 1897, represents the situation and condition at the present time," which respondent denies.

2.

That the allegations in paragraph 5, 6, 7, 8 and 9 respondent admits to be true.

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3.

That as to paragraph 10, respondent does not admit its desire to avoid paying the stamp tax, so-called; but submits that under the terms of said act of Congress, properly construed, it is not made respondent's duty to pay said tax, only when some party who would be a shipper, mutually agrees with respondent to enter into the relation of shipper and carrier; and said party has tendered for shipment some article to be carried by defendant, which it has accepted for that purpose, then, and only then, is respondent liable under said Act to provide and attach said stamp. That by requiring in the manner it does, as hereinafter stated, every person who seeks its service as carrier, to bear the burden of said tax, respondent does not in any way violate, nor has it in any way violated, its duty as common carrier.

4.

That in paragraph 6 said petitioner admits and alleges, and it is undoubtedly true, "that it is the duty of respond-"ent to receive and accept and transmit said packages "when duly offered and tendered to it for that purpose, "*and the charges therefor paid or tendered*," and respondent shows that, in the case of pretended violation of its duties, specified and set forth in paragraph 10 of said petition, and in the cases of such violation generally referred to in paragraph 11 of said petition, *it is not pretended nor alleged that in any case were* "the charges therefor paid *or tendered*," *which* should have been the case, to have made it the duty of respondent to accept any or all of said packages as claimed.

5.

That said petition in paragraph 12 states that this respondent "*has* refused to discharge its duty as common carrier;" and "*has*, to a material degree, suspended the exercise of its function;" and "*has* refused to accept and transport a great part of the goods, wares and merchandise duly offered and tendered to it, except upon the consent of the shipper to pay the said stamp tax, whereby great loss and damage *has* accrued to the people of the State;" and "the trade and commerce is greatly injured by the refusal and neglect of said respondent company to perform its duties of carrier, unless the stamp tax so-called is paid by shipper and consignor so tendering such goods to said company for transportation."

That respondent submits that such acts and refusals on its part, as so alleged, do not make or present a case or cases susceptible of being rectified, reformed or punished at the instigation of the Attorney-General, or any other person, by use of the writ of Mandamus, nor do such acts and refusals make or constitute any case within the jurisdiction of this court.

6.

This respondent further shows:

That it is the policy of all taxation laws under this government that such burdens imposed thereby shall be as generally and equitably distributed as is possible, in order that such tax burden may be cast upon the many as a small burden rather than it should be a larger one cast upon the few.

That in the act, Congress seems carefully to have refrained from providing, as between shipper and carrier, which shall bear the burden of the tax, thereby evidently

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intending to leave it a matter of adjustment by the parties, with the stringent condition, however, that if their necessities require them to enter into the business relation of shipper and carrier, as a condition precedent to their acting as such, the tax must be paid.

7.

That respondent, regularly organized and existing under and by virtue of the laws of New York—and acting under regularly issued license of this State—by its organization and compliance with the laws of this State as admitted in paragraph 5 of said petition to have been done, became vested with the right to exist in a corporate capacity, and to regulate the carrying on of its business by reasonable rules and regulations, and to fix and insist upon the payment of such rates of transportation as it deems best, provided the same are not unreasonable in amount nor in manner of payment.

8.

That the enactment of the Stamp Act referred to, being an *important change* in the then condition of things, it became necessary for respondent to change and regulate its method of transacting its business, and to re-establish its rates of transportation, so that it might meet *that change* in a way to prevent its resources from being so depleted as to weaken its financial condition.

Respondent, therefore, decided to raise, and did raise, its rates of transportation to an amount reasonable and just and only necessary to meet the change of conditions made by said Act, and save itself from great loss of revenue and profits as compared with its earnings before the passage of said Act.

And respondent submits and asserts that it had the full

and perfect right to make such change in its method of transacting its business and in its former rates of transportation.

9.

That in many cases it has been customary, though not obligatory upon respondent, for it to accommodate shippers by carrying their packages and collecting the transportation charges from the consignee, at the point of delivery, a privilege of great value to shippers and of great convenience to them, and one wholly within the discreton of respondent to stop or deny at any time.

That under its right to regulate its manner of doing business and regulating its rates, and with a view, as far as possible under the circumstances, of accommodating the public so far as paying said increase of rates, respondent has accorded to responsible shippers the right to pay such increase (either using a stamp or money for the purpose) upon delivery of the goods, and the privilege of paying the balance of the rate of transportation at the point of delivery to the consignee.

10

Respondent admits that the regulation of its business affairs and change in its rate of transportation as above stated, in effect, throws the burden of the said tax upon the shipper by force of circumstances, and that such effect is in accordance with the principle of taxation before referred to, that the burden should be distributed equitably among the many rather than be cast upon the few. That should respondent be compelled to pay said tax, of which the expense thereof would amount to many thousands of dollars, without its right to guard against the effect of such expenditure in the manner adopted by it in raising

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its rate of transportation as it has done, its financial condition would be greatly weakened.

Therefore respondent submits that it has not been guilty of any violation of its duty as common carrier; that the effect of so doing throws the burden of tax upon the shipper, does not in any way lessen, or limit, or interfere with the respondent's right to manage its business and regulate its rates of charges, and that the changes made in that regard are reasonable and proper; and that the petition herein does not make or state a case that will warrant this court in granting the prayer thereof.

Wherefore respondent prays that the prayer of said petition be denied and the petition dismissed.

WISNER & HARVEY,
Attorneys for Respondent.
H. C. WISNER,
Counsel.

.....
Respondent.

EXHIBIT C.

At a session of the circuit court for the county of Wayne, held at court room No. 4 of said court, on Sept. 21st, 1898. Present, Hon. R. E. Frazer, circuit judge.

FRED A. MAYNARD, Attorney General, *ex rel.*, GEORGE F. MOORE, *et al.*, *vs.* AMERICAN EXPRESS CO., and CHARLES F. REED.	No. 38,638

The above entitled cause having heretofore, on the 13th day of August, 1898, been submitted for hearing on petition and answer, and the same having been duly considered, it is now by the court ordered that a writ of mandamus do issue, in accordance with the prayer of said petition.

And it is further ordered that a stay of all proceedings be had for the period of ten days from this date.

This order will be entered *nunc pro tunc* as of Sept. 21st, 1898.

R. E. FRAZER,
Circuit Judge.

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No. 220.

Brief of Warner for D. E.

In the Supreme Court of the United States.

Filed Oct. 12, 1899.

October Term, 1899.

Office Supreme Court U.
FILED
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JAMES H. McKENNEY,
Clerk

THE AMERICAN EXPRESS COMPANY, A Body Corporate, and CHARLES F. REED, *Plaintiffs in Error*, vs. FRED A. MAYNARD, Attorney General of the State of Michigan, at the Relation of GEORGE F. MOORE, *et al.*, *Defendant in Error.*	No. 220

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

C. E. WARNER,
Attorney for Defendant in Error.

POTTER PRINTING CO., DETROIT, MICH.

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In the Supreme Court of the United States.

October Term, 1899.

THE AMERICAN EXPRESS COMPANY, A Body Corporate, and CHARLES F. REED, *Plaintiffs in Error,* *vs.* FRED A. MAYNARD, Attorney General of the State of Michigan, at the Relation of GEORGE F. MOORE, *et al.*, *Defendant in Error.*	No. 220

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

On May 1st, last, we submitted to this court a motion to dismiss the writ of error, and remand the cause to the Supreme Court of the State of Michigan.

Briefs were submitted upon both sides, and the court postponed further consideration of the motion until the hearing of the case upon the merits.

It was there contended that the issue, as raised by the respondent, did not involve or draw in question the validity or construction of a statute of the United States, or a right, title, privilege or immunity set up or claimed thereunder; but, on the contrary, only the common law right of the Express Company as a common carrier, to *regulate its rates* by imposing increased burdens upon ship-

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pers, in view of the tax which the act of Congress had imposed upon it.

We press this phase of the controversy upon the court's attention, and submit that when the pleadings of the respondent, under which the issue is raised, are critically examined, it will be found thet no "*Federal right*" is, in effect, asserted, but rather an alleged *common law* right to raise its rates to meet the requirements af the Stamp Act.

We refer the court to the brief in behalf of the defendant in error, furnished upon this motion.

Should the court not agree with us in this contention, then, we submit, upon the merits of the controversy, that the decision of the Supreme Court of Michigan, (77 N. W. Rep., 317,) holding that it is the duty of the Express Company under the "*Express and freight* provision of Schedule A," of "An Act to Provide Ways and Means to meet War Expenditures, and for other Purposes," passed June 13th, 1898, to affix the stamp, without requiring the shipper to pay therefor, was and is correct.

The respondent, the American Express Company, is a joint stock association, organized and existing under the laws of the State of New York, and having its principal business office located in the City of New York, in said State, and is a common carrier, transacting the express business, so-called, and engaged in the business of receiving, carrying, forwarding and delivering goods, wares and merchandise.

The company is doing business in Michigan, under and in pursuance of a permit and license issued by the State Treasurer of the State, under and in pursuance of the provisions of *Chapter 103 of Howell's Annotated Statutes.*

The company complied with the terms and provisions

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of the Act, and thereupon received a permit and license to do business in the State of Michigan, and to receive, accept and transmit packages, from point to point, throughout the United States.

On June 13th, 1898, the Congress of the United States enacted a Revenue Law, so-called, entitled, "An Act to Provide Ways and Means to meet War Expenditures, and for other Purposes."

Section 6 of said Act, provides as follows:

> "Sec. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid for, and in respect of the several bonds, debentures or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described *in Schedule A of this Act*, or for or in respect of the vellum, parchment or paper upon which such instruments, matters or things, or any of them, shall be written or printed, by any person or persons, or party, who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule."
>
> "Sec. 7. That if any person or persons shall make, sign or issue, or cause to be made, signed or issued, any instrument, document or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive

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stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall pay a fine of not more than one hundred dollars, at the discretion of the court, *and such instrument, document or paper as aforesaid, shall not be competent evidence in any court.*"

Schedule A of said Act, among other things, provides as follows :

"Express and Freight : It shall be the duty of every railroad or steamboat company, carrier, *express company* or corporation, or person whose occupation is to act as such, *to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles or not so enclosed or included ; and there shall be duly attached and canceled, as is in this Act provided, to each of said bills of lading, manifest, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent :* Provided, That but one bill of lading shall be required on bundles or packages of newspapers when enclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest or other memorandum, as herein provided, *shall subject such railroad or steamboat company, carrier, express company or corporation, or person,* to a penalty of fifty dollars for each offense, *and no such*

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bill of lading, manifest or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid."

The respondent, upon the delivery of packages to it for transportation as a common carrier, refused to *accept* goods for transportation, *unless the shipper or consignor would pay or provide for the stamp provided by said Act.* This act, upon the part of the express company, *was general and uniform.*

Packages of merchandise were offered to the express company for transportation by the several relators mentioned in the petition herein, and the company refused to accept such goods for transportation, unless such stamp was paid or provided.

Therupon, Fred A. Maynard, Attorney General of the State, upon relation of the several firms and persons mentioned in the petition, presented a petition to the Circuit Court for the County of Wayne, for a *mandamus* to require the respondent to receive, accept, transmit and deliver goods, wares and merchandise, duly offered or tendered to it for transportation, when the fees and charges for such goods were offered, paid or tendered, and to issue to the shippers or consignors a bill of lading, manifest, or other evidence of receipt, and forwarding of each shipment, with the stamp duly attached thereto, as provided by said Act of Congress.

This petition set forth in substance :

1. That the Express Company was a joint stock association, as aforesaid.

2. That it was a common carrier, transacting the express business, and was engaged in the business of receiving, carrying, forwarding and delivering goods for hire, on behalf of all persons, &c.

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3. That on Jan. 29th, 1897, (the date of its last report,) said company had 498 agencies in the State of Michigan alone, at which said agencies the company received goods, wares and merchandise for transportation to various points in the State of Michigan, and throughout the United States, and was then, and still is, a common carrier, holding itself out to the public as authorized to receive, carry and deliver such boxes, bales, &c.

4. That the business of said company was large and lucrative, and that by the report of the company, filed in the office of the State Treasurer, on Jan. 29th, 1897, the company represented that its business was represented by 180,000 shares, and that the working fund of the association was fixed at $5,300,000, and the amount of the gross receipts for the then current business in the State of Michigan for the year ending December 31st, 1896, was the sum of $130,459.25.

5. That Chapter 103 of Howell's Annotated Statutes of the State of Michigan, provides that it shall not be lawful for any person or persons to act within this State as agent or officer, in transacting the express business, &c., without first procuring a certificate of authority or license from the State Treasurer, and that before obtaining such certificate the company was required to furnish the State Treasurer, annually, in the month of January, in each year, with a statement, under oath, of the matters required by said statute.

That thereupon, the Express Company, association, firm or corporation, complying with the requirements of said act, and receiving such certificate, was and is permitted to do business freely in any part of the State.

6. That the company had substantially complied with the terms and provisions of said act, and thereupon received such permit, and was authorized to do business in

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the State, and to receive, accept and transmit packages, and that it was the duty of respondent to so receive, accept and transmit such packages, when duly offered or tendered to it for that purpose, and the charges paid or tendered.

7. That the business of said corporation is of a public or *quasi* public character, and a public function used and exercised by said company for the people at large throughout the State of Michigan, as well as other States of the United States, and in which the public has a substantial interest, and the abuse or misuse of which is of a substantial nature.

8. That the persons, at whose relation the proceeding was instituted by the Attorney General of the State, constitute a portion of the people of the State of Michigan, and the public at large ; and that the refusal of the respondent to receive, accept and transmit goods, wares and merchandise, in said petition more particularly stated, constituted but a few out of many cases of like character, *and were presented for the purpose of representing the uniform course and practice of the respondent company.*

9. That on June 13th, 1898, Congress passed the Act which is hereinbefore referred to.

10. That by reason of a desire of the respondent to avoid the payment of the stamp tax, and to impose such obligations on the shipper, the respondent refused to accept any goods for transportation unless such shipper attached the stamp to the said bill of lading, manifest or other evidence of receipt and forwarding for each shipment, or furnished the money and means for that purpose; and that the said company thereby not only avoided its duty under the Act of Congress to pay and bear its proportion of the revenues to meet war expenditures, *but*

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violated its duty as a common carrier to receive, accept, transport and deliver such goods, wares and merchandise so offered and tendered to it for that purpose.

[This paragraph was and is supported by specific allegations of tender and refusal upon the part of the Express Company.]

11. That the above and foregoing constituted but a few of many instances of like character, *and that it is the uniform course and practice of the respondent to refuse to receive, accept, transport, carry and deliver such goods, wares and merchandise, in boxes, bales, packages, bundles or otherwise, unless the said stamp tax was paid or provided by the shipper.*

12. *That the respondent substantially refused to discharge its duty as a common carrier, and has, to a material degree, suspended the exercise of its functions and franchises, by refusing to take goods, wares and merchandise, in boxes, packages, &c., which have been offered and tendered to it, at its places of business, for transportation at the usual rates, and upon the usual terms;* and has refused to accept and transport a great part of such goods, wares and merchandise, except upon the consent of the shipper to pay the stamp tax, whereby great loss and damage has accrued to the people of the state, and the trade and commerce of the people of the state is greately injured by the refusal and neglect of the respondent to perform its duties as common carrier, unless the stamp tax was paid by the shipper.

The respondent filed an answer, in which the material allegations of the petition were substantially admitted, but the respondent submitted that under the terms of said Act of Congress, it was not made respondent's duty to pay said tax, only when some party, who would be a shipper,

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mutually agreed with respondent to enter into the relation of shipper and carrier, and said party had tendered for shipment some article to be carried by defendant, which it had accepted for that purpose.

By paragraph 4 of its answer, it is alleged that in any cases of pretended violation of its duties, as set forth in the petition, it was not pretended or alleged that the charges were paid or tendered, but this point, as appears by the opinion of the Circuit Judge, (a copy of which is attached hereto,) was abandoned upon the argument, and the cause was left for the court below to decide the same as if the charges had been tendered, so that such question was eliminated from the case. See opinion of the Circuit Judge.

The answer further sets up, in substance:

(a) That it is the policy of all taxation laws that such burdens imposed thereby shall be as generally and equitably distributed as possible.

(b) That the respondent, by its organization, in compliance with the laws of the State of Michigan, became vested with the right to exist in a corporate capacity, and to regulate the carrying on of its business by reasonable rules and regulations, and to fix and insist upon the payment of such rates of transportation as it deemed best. Par. 7.

(c) That the enactment of the Stamp Act made it necessary for respondent to change and regulate its method of transacting its business, and to re-establish its rates of transportation, and respondent therefore decided to raise, and did raise, its rates of transportation, to an amount reasonable and just, and only necessary to meet the change of conditions made by the act, and save itself from great loss of revenue and profit as compared with its earnings before the passage of said act. Par. 8

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(d) The respondent alleged that under its right to regulate its manner of doing business, and to regulate its rates, respondent has accorded to responsible shippers the right to pay such increase, either using a stamp or money for the purpose, upon delivery of the goods, and the privilege of paying the balance of the rate of transportation at the point of delivery to the consignee. Par. 9.

(e) *That respondent admits that the regulations of its business affairs, and change in its rate of transportation, throws the burden of the said tax upon the shipper, by force of circumstances, and that such effect is in accordance with the principle of taxation before referred to.*

ARGUMENT.

I.

The relator contends that the respondent is a common carrier, and that, as such, it is its duty to *accept and receive* for transportation, all packages of merchandise tendered to it for transporation, when the fees for so doing are paid or tendered.

The respondent declines to "*accept*" such packages for transportation, unless the stamp tax imposed by congress is paid by the shipper.

The relator contends, upon the other hand, that the express company is a common carrier, and cannot avoid its duty as such to the public, by imposing upon the shipper the payment of an obligation which the law has imposed upon it, and that such company cannot, under the guise or pretense of raising its rates, cast this burden or

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obligation upon the public, and thereby avoid its own duty.

The respondent is a common carrier, and as such it is its duty to receive for carriage, and to carry the goods of any person, tendered to it for transportation, provided they are such as it holds itself out as willing to carry, and the party tendering them offers to pay its proper charges.

Am. & Eng. Ency. of Law, Vol. 5, 2nd Edition, pp. 158-159.

See also

Am. & Eng. Ency. of Law, Vol. 7, 1st Ed., p. 543, et seq.

Chicago, &c., R. Co., vs. Suffern, 129 Ill., 274.

Peoria, &c., R. Co., vs. Chicago, &c., R. Co., 109 Ill., 135.

Louisville, &c., R. Co., vs. Flanagan, 113 Ind., 488.

Messenger vs. Railroad Co., 37 N. J. L., 531.

The duty of a common carrier to accept for transportation all goods properly tendered *is one imposed by law*, arising out of the relation the carrier sustains to the public; and it is not necessary to allege or prove any special contract to carry.

Am. & Eng. Ency. of Law, Vol. 5, 2nd Ed., p. 160.

Doty vs. Strong, 1 Pin., (Wis.), 313; 40 Am. Dec., 773.

Adams Express Co. vs. Nock, 2 Duv., (Ky.), 562; 87 Am. Dec., 510.

The law imports into the contract for the transportation of goods, *an implied obligation to ship within a*

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reasonable time after the goods have been delivered for that purpose; and this element becomes a substantial provision of the contract, as much as if it had been expressly written in it, and its effect cannot be changed, altered or modified, by parol.

Penn. Co. vs. Clark, 2 Ind. App., 146.
Rankin vs. R. R. Co., 55 Mo., 167.

"Common carriers undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, as a business, and with or without a special agreement as to price. As they hold themselves to the world as common carriers for a resonable compensation, they assume to do and are bound to do, what is required of them, in the course of their employment, if they have the requisite convenience to carry, and are offered a reasonable or customary price."

In Re 318 1-2 Tons of Coal, 14 Blatch., 453-458.

And a common carrier cannot avoid its duty to the public, by "*regulations.*"

Southern Express Co. vs. Moon, 39 Miss., 822.
Garton vs. Railroad Co., 1 B. & S., 112.

Nor can the duty be avoided by a requirement of the company which is not a reasonable one.

In Re 318 1-2 Tons of Coal, Supra.

Michigan Central Railroad Co. vs. Ward, 2 Mich., 540:

In this case, the court, in construing the liablility of common carriers, says:

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> "In the absence of any special contract, or local custom, or usage of particular trades, governing or controlling the action of the parties, it is incumbent upon a common carrier, by the rules of the common law, to deliver the goods entrusted to his care to the consignee personally, and, until such delivery, he does not discharge himself from the obligations and duties the law imposes upon him."

In Michigan Central Railroad Company vs. Hale, 6 Mich , 243, the court held *that a common carrier has no power to restrict, in any manner, his common law liability*, but is bound to transport the property entrusted to him under this liability, if it be not waived or changed by contract.

At page 257, the court, in referring to the liability of the railroad company as a common carrier, say:

> "It was made their duty to transport property for all persons indifferently; *and this they cannot refuse to perform.* This duty is, in the absence of any contract, attended with extraordinary responsibilities and liabilities, which constitute them insurers of property while in their possession as carriers, and they can no more restrict these, unless upon the free and full agreement of the party dealing with them, than they can refuse to carry when required."

In *McMillan vs. Railroad Co., 16 Mich., 79*, the court holds that carriers cannot limit their liability by a mere notice published, or posted, or otherwise brought to the knowledge of the consignor; *nor can they refuse to receive*

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property for transportation, unless the consignor will agree to enter into a special contract therefor.

See, also,

Grand Rapids, &c., R. R. Co. vs. Huntley, 38 Mich., 546.

II.

The respondent contends that under the act of congress, properly construed, it is not made respondent's duty to pay the tax only when some party, who would be a shipper, mutually agrees with respondent to enter into the relation of shipper and carrier; but it will be seen from the foregoing citations that the carrier cannot refuse to receive property for transportation, unless the consignor will agree to enter into a special contract therefor. In other words, the liability of the common carrier is imposed when goods are tendered to it for transportation.

The duty is one imposed by law, arising out of the relation the carrier sustains to the public. The law imports into the contract an implied obligation to ship within a reasonable time, and its effect cannot be changed, altered or modified.

The duty to pay the tax, under the provisions of the act of congress, has been clearly imposed upon the *carrier*, and not upon the shipper. We think every government officer or court which has been called upon to construe this law has, thus far, so decided. The act itself clearly indicates this. Stripped of unnecessary verbiage, the act is as follows:

> *"It shall be the duty of every" * * * "express company" * * * "to issue to the shipper or consignor, or his agent or per-*

son from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding, for each shipment received for carriage and transportation, whether in bulk, or in boxes, bales, packages, bundles, or not so enclosed or included, and there shall be duly attached and canceled, as in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent."

The law imposes upon the *carrier* the obligation to *issue* the receipt. This is an act with which the shipper has nothing to do. He takes a package to the company for transportation and tenders the usual or customary fees. There his relation ends. The duty of the carrier then springs into existence, and that duty is to issue to the shipper a receipt, &c. "*And there shall be duly attached and canceled to each of said bills of lading,*" *&c., a stamp of the value of one cent.*

Under the provisions of section 7 of the Act, no instrument, document or paper shall be competent evidence, in any court, without having thereupon such adhesive stamp, to denote said tax.

Section 14 likewise provides that no such paper, "which has been signed or issued without being duly stamped, or with a deficient stamp, shall be recorded or admitted or used as evidence in any court, until the legal stamp denoting the amount of tax shall have been affixed."

It seems to us that a reading of this law, with a fair consideration of its objects and purposes, will clearly indicate that the obligation to *issue* the receipt, bill of lading or memorandum, is upon the ~~shipper~~ carrier, and that this receipt, bill of lading or memorandum, *is not a legal instru-*

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ment, which the law requires to be delivered to the shipper, *until the adhesive stamp is affixed.*

It will, we think, be unnecessary to discuss the contention of respondent's counsel, that it is the policy of all taxation laws, that the burdens imposed thereby shall be as generally and equitably distributed as is possible, in order that such tax burden may be cast upon the many, as a small burden, rather than a large one, upon the few.

This abstract proposition may well be admitted as a governmental policy, *but we deny the right of the respondent to avoid the obligation which Congress has thrown upon it, under the so-called regulation of rates*, as indicated in paragraphs 9 and 10 of respondent's answer, wherein respondent admits "*that the regulation of its business affairs, and change in its rate of transportation, * * in effect, throws the burden of the tax upon the shipper by force of circumstances.*"

It may well be contended by the relator, that the people of the state, which includes the great body of shippers, are paying, without objection, the taxes for war expenditures, *which the Act of Congress has imposed upon them*, and that these burdens are sufficient for them, without being required, under the so-called "*regulation of rates*," to bear the burden which Congress has imposed upon the express companies.

It will be noted that the Act is somewhat peculiar. While the Act imposes a penalty for its violation, yet the Act is peculiar in that it requires the express companies to pay the stamp tax upon goods "*accepted for transportation.*"

The government, therefore, refuses to proceed against express companies for a violation of the Act, *unless it be made to appear that the company has accepted for transportation* such goods for shipment, and has thereupon refused to attach the stamp. It is, therefore, incumbent

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upon shippers to *compel* the express companies to perform their duties as common carriers, by accepting such goods for transportation, and such goods being accepted, and the stamp tax then not being affixed, the government is ready to prosecute such companies for a violation of the law.

The question, as will be observed, is a new question arising under the Act of Congress, and relators' contention cannot, therefore, be fortified by adjudicated cases of courts of last resort.

The question has, however, been decided in favor of relators' contention, by Judge Tuley, of the Superior Court of Cook County, Illinois, in the case of *People ex rel Western Wheel Works vs. The United States Express Company*, reported in the Chicago Legal News, Vol XXX, No. 49, July 30th, 1898, p. 408, in which the learned Judge holds, in substance:

(a) That the Federal War Revenue Act, so far as applied to express companies, is the exercise of the power to tax the business of the express companies, by way or by means of imposing a stamp tax on its bills of lading or receipts, which it is compelled to use in the transaction of its business.

(b) That the law requires the express companies to issue the receipt to the shipper, and as a part of such issue, contemplates the affixing and cancellation of the stamp.

(c) That when the increased cost of handling and transportation demand it, a common carrier has the right to revise and increase its rates, but it cannot arbitrarily do so in order to make its customers or the public pay a tax imposed by law on such carrier, or upon the business transacted by it.

(d) That a horizontal increase of one cent per ship-

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ment, whether it be for a long or short distance, is not a "*revision*," or permissible increase of rates.

We take the liberty of publishing the opinion, in full, as an appendix to this brief.

In the case at bar, the Hon. Robert E. Frazer, the learned judge who heard the case in the court below, filed an opinion, wherein it is held, that it is manifest that it was the intention of Congress to require the express companies to deliver to the person offering for shipment any goods or packages, a receipt for the same, and that it requires such receipt to have attached to it a revenue stamp of one cent. That this makes it clear that it is the duty of the express company to deliver to such shipper, a full and complete receipt, *and a receipt would not be full and complete, or legal, unless it had attached to it and canceled, a revenue stamp of the value of one cent.*

Further, that that right to determine and make reasonable charges for the transportation of goods, is a different thing from the increase of rates which had theretofore been deemed reasonable, for the purpose of avoiding the payment of the tax directed by Congress for the raising of revenue for the carrying on of the war; and that the increase was not in any sense for the purpose of meeting any additional expense that the express company might be put to, but was added for the express purpose, as was practically admitted, of transferring the burden of paying a portion of the revenue necessary to carry on the war, from the shoulders of the express company to those of its patrons, and that the raising of the rate of one cent upon each package, was, in effect, to impede the operation of the law, and therefore illegal.

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We also take the liberty of appending hereto, a copy of the opinion of the learned Circuit Judge.

The Supreme Court of Michigan carefully considered this question, and in an opinion by Mr. Justice Long, concurred in by the entire court, (77 N. W. R., 317-320,) say:

"The main question in the case relates to the construction to be placed upon the act in question. By the act every express company is compelled to issue to every shipper or consignor, etc., a bill of lading for each shipment received for carriage, to which bill of lading, and duplicate thereof, there shall be attached and canceled a stamp of the value of one cent. The law therefore imposes upon the carrier the obligation to issue the receipt. With this the shipper has nothing to do. He delivers the package to the company, and pays or tenders the usual charges. This ends the shipper's duty, and the law then compels the carrier to issue the receipt or bill of lading. This bill must be stamped, and the stamp canceled. It is evident that it is as much the duty of the company to place the stamp upon the receipt and cancel it, as it is to issue the receipt. This duty is made more apparent by the fact that the act further provides that failure to issue the receipt makes the carrier, so failing, amenable to a heavy penalty. But it is contended by counsel, in a brief filed with this court, that the penalty was dircted, and intended by Congress to be directed, to the failure to issue the receipt, and nothing more, leaving the question of the stamping of the same to be settled by the parties. It seems to us that what is meant by this clause is, that the receipt must be such as is provided—that is, a receipt bearing the proper stamp—and that the penalty is provided for such a failure as this. It is, and always has been, the custom of express companies to issue receipts for goods delivered for shipment. The only interest the

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government has or can have is the affixing and cancellation of the stamp to aid it in its war revenues. We are therefore led to the conclusion that the duty to issue the receipt, and the penalty affixed for the failure to do so, imply that it is to be a receipt which would bring the government the revenue provided. Therefore, the act makes it the duty of the company to affix the stamp."

Referring to the contention of the company, that it had the right to make new regulations and establish new rates to meet the additional burden imposed upon it by the Act of Congress, the court say:

"It is conceded that the effect of this is to throw the burden upon the shipper. It is apparent upon the face of this proceeding that the very purpose of this change in the regulations and the increase of rates is to avoid the payment of the tax, and thus cast upon the shippers the burden which the Act of Congress puts upon the company. This is but an evasion, and a subterfuge to avoid the terms of the act. The pretense that raising the charges on each package just one cent, without reference to the distance to be carried, the weight or bulk of the package, and the former fixed charges, is a regulation of charges, can hardly be treated seriously. If the charges established were regarded as too small, it would seem that the action would have been to make the additions in some manner to correspond to the length of carriage, weight, etc., but to add one cent to every charge for carriage bears upon its face evidence of the attempt to evade the act. Where the charge established was 25 cents, it is now 26 cents; where it was 50 cents, it is now 51 cents; where $1, it is now $1.01, and so on; adding just 1 cent to each charge. It cannot be that this was done because the charge was too low for each carriage, however long the distance, or however

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weighty the article. The statement of this claim is its own refutation. We are aware that Judge Lacombe, of the United States Circuit Court of New York, has held the other way upon this question, in the case of Merchants' Ass'n of New York *vs.* Adams Express Co.' Fed. , as also the United States Circuit Courts of North Carolina and California; but we are unable to agree with those cases. Judge Tuley, in the Superior Court of Cook County, Illinois, has, however, held in accordance with our views here expressed. It is said by him that 'it is not in fact a revision or increase of rates, but an arbitrary attempt of the company to make the shippers pay a tax which the law requires the company to pay. The court must regard the substance of the contention, and not the pretense.' "

Read in connection with the ordinary common law obligation of the Express Company as a common carrier, there are two duties imposed upon the carrier:

First. To receive for carriage, and to carry the goods of any person tendered to it for transportation. (See cases cited.)

Second. To issue to the shipper * * * a bill of lading, manifest or other evidence of receipt and forwarding, for each shipment received for carriage and transportation.

> "*And there shall be duly attached and canceled, as in this act provided, to each of said bills of lading, manifest or other memorandum, and to each duplicate thereof, a stamp of the value of one cent.*"

The duty to receive and the duty to issue the bill of lading, manifest, &c., are correlative; one follows the other. The duty to issue a *legal* receipt is imposed upon

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the carrier by the Act of Congress. The receipt is not *legal* unless the stamp is attached. Nothing can be drawn from the Act showing any intention upon the part of Congress, either express or implied, to impose the obligation upon the shipper.

The law imposes the obligation upon the company to issue the bill of lading, manifest or other evidence of receipt and forwarding to the shipper; and *section 7* of the Act provides, in substance, that if any person shall issue, or cause to be issued, any instrument, document or paper of any kind or description whatsoever, without the same being duly stamped, such person shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall pay a fine, &c., "*and such instrument, document or paper, as aforesaid, shall not be competent evidence in any court.*"

If the Act imposes upon the company an obligation to *issue* the receipt, and at the same time imposes a criminal liability for issuing such receipt without the same being duly stamped, then the inference would seem to logically follow, that the issuing and stamping of the receipts are correlative obligations, and that the express company is, therefore, driven to the position that they are not bound, under the Act, to *accept* goods for transportation unless the stamp is prepaid by the shipper. In other words, that the company can avoid its common law obligation to receive and transport goods of this character by imposing upon the shipper the obligation to do what the Act imposes upon the company itself.

The statement of this proposition would seem to bear its own refutation.

The paragraph dealing with the "Express and Freight" provision of the Act is one dealing with carriers as such. It does not undertake to determine under what circumstances the carriers shall "*accept*" goods for transportation. They are left in this regard to their common law

obligation, but it does distinctly provide that when such goods are accepted for transportation, the express companies shall issue the receipt; *i. e.*, a legal receipt, to which shall be attached the stamp in question.

That the tax is intended to be imposed upon the express business as such, is clearly the view of the Treasury Department. Hon. N. B. Scott, Commissioner of Internal Revenue, in a decision under date of Aug. 25th, 1898, (Treasury Decision, No. 19,965,) in reply to an inquiry in behalf of the Expressmen's League of Massachusetts, as to whether the short local express lines represented by such League, came within the provisions of the Act, says:

> "In reply, you are informed that the Act of June 13, 1898, in its provisions requiring stamped bills of lading to be issued by express and freight companies to shippers of goods accepted for trasportation, does not apply to individual persons, firms or local companies delivering packages, parcels, bundles, railway baggage, and the like, solely on call and at special request, in the various localities, but within city limits, adjacent to their own place of business. *It is only upon the transaction of an express business conducted upon regular routes and designated times*, upon regular trips and as a business of carriage and transportation from one point or place in the country to another point or place, *that the requirement of the law to issue to the shipper or consignor from whom any goods are accepted for transportation, a bill of lading, manifest or other evidence of receipt and forwarding for each shipment received, and to stamp the same, applies and is imposed.*"

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By Treasury Decision No. 19,803, under date of Aug. 1st, 1898, the Commissioner regards it as the duty of the carrier to stamp the bill of lading or receipt, *in case it accepts the merchandise for transportation*, but the question of the obligation of the carrier to *accept*, is left to the common or statute law of the state. He says:

Treasury Decision No. 19,803, Vol. 2, p. 234.

BILLS OF LADING.

Duty of carrier to furnish the shipper a stamped bill of lading or receipt—has a remedy in case of refusal.

"Treasury Department,
Office of Commissioner of Internal Revenue,
WASHINGTON, D. C., Aug. 1, 1898.

SIR: Your letter of June 30th, to the Secretary of the Treasury, was by him referred to this office for reply. An enormous pressure of similar inquiries has hitherto prevented consideration of your letter.

You ask as to whose duty it is to pay the expense of the stamp required for bills of lading or receipts given by common carriers.

I answer that the carrier who accepts merchandise for transportation is required to furnish the shipper a stamped bill of lading or a receipt therefor. If he fails to do this, he incurs criminal liability; but if he refuses to accept the goods for transportation, except on condition that the owner or shipper shall pay the sums necessary to purchase the stamp or stamps, in addition to the customary charge for the transportation, the war revenue law provides no remedy; nor does any internal revenue law. *It would seem that, in such cases, the aggrieved party must depend upon the common or statute law of the state defining the obligations of common carriers.*

Respectfully yours,
N. B. SCOTT,
Commissioner."

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And the Hon. John W. Griggs, attorney general, says:

"Office of the Attorney General,

WASHINGTON, D. C., Aug. 16, 1898.

COL. JOHN J. McCOOK,

No. 120 Broadway, N. Y.

DEAR SIR: Replying to your letter of the 13th inst., I have the honor to advise you that the attitude taken by the Department of Justice with reference to the question as to which party, the shipper or the express company, under the war revenue bill, is required to furnish and pay for the revenue stamp, which is required to be placed upon the manifest or bill of lading, is, that this is a matter entirely between the shipper and the company. This office holds that, so far as the government is concerned, it is only interested to know that the lawful tax is paid. As between the shipper and the express company, I have decided that the matter is not within my province of consideration under any case that has yet arisen. The United States District Attorneys are instructed by this office that they may prosecute, for the prescribed penalty, any company which issues a manifest or bill of lading without the prescribed stamp; but that in controversies arising between the shippers and express companies as to which one shall be required to bear the expense of the stamp, the government has no direct concern under the war revenue law.

Very respectfully yours,

(Sgd.) JOHN W. GRIGGS."

As we have seen, the law imposes the obligation upon the shipper to issue the receipt. The affixing of the stamp is one step only in the issue of this receipt. It differs in no material respect from any other act required in the issue. The company is the maker of the instrument.

In construing the act of '66, Commisioner of Internal Revenue Rollins, says:

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> "It is the duty of the maker of an instrument to affix the stamp thereto, and to cancel the same in the manner required by law."
>
> *4 Int. Rev. Rec., p. 61;*
> *4 Int. Rev. Rec., p. 164.*

In *Latham vs. Smith, 45 Ill., 25-26*, in speaking as to the necessity of attaching the stamp by the maker of an instrument, the court say:

> "If necessary, the note was as incomplete (without the stamp) as if it had lacked the maker's signature, and the attaching and canceling it without authority would be as unauthorized as writing the maker's name to the instrument without authority. If that is important, it is the last act essential to its validity, and is as much the act of the maker, as is the signature."

In *Myers vs. Smith, 48 Barb. (N. Y.) 614-636*, the court, in construing the Internal Revenue Act of 1864, (U. S. Statutes 1864, Chap 173, Sec. 151,) say:

> "It is clear to my mind, that the person executing the document which requires the stamp, is the one to affix it, and that in any event it cannot be affixed, nor the cancellation be made by another party, without the actual knowledge, and the express or implied consent of the party who issues the paper on which the stamping is placed."

In *Blunt vs. Bates, 40 Ala., 470-3*, in construing this act, the court say:

"Under the stamp act, if the note was made in the United States, it was the duty of the maker, at the time it was executed, to stamp it and cancel the stamp, and upon

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his failure, the payee was authorized, in certain cases, to do so."

COMPARISON OF STAMP ACTS.

A comparison of the stamp acts of 1862, 1863 and 1864, with the Act of 1898 may aid in the solution of the question.

Section 94 of the Act of 1862, (U. S. Statutes at Large, Vol. 12, p. 475,) provides as follows:

"Sec. 94. And be it further enacted, that on and after the first day of October, 1862, there shall be levied, collected and paid for and in respect of the several instruments, matters and things mentioned and described in the schedule (marked "B") hereunto annexed, or for or in respect of the vellum, parchment or paper upon which such instrument, matters or things, or any of them, shall be written or printed by any person or persons or party who shall make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued, the several duties or sums of money set down in figures against the same respectively or otherwise specified or set forth in the said schedule."

"Sec. 95. And be it further enacted, that if any person or persons shall make, sign or issue, or cause to be made, signed or issued any instrument, document or paper of any kind or description whatsoever, without the same being duly stamped for denoting the duty hereby imposed thereon, or without having thereupon an adhesive stamp to denote such duty, such person or persons shall incur a penalty of fifty dollars, and such instrument, document or paper aforesaid, shall be deemed invalid, and of no effect."

(These sections are substantially the same as sections 6 and 7 of the act of June 13, 1898.)

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Section 105, p. 478:

"Sec. 105. And be it further enacted that on and after the date on which this act shall take effect, no express company, or its agent or employee, shall receive for transportation, from any person, any bale, bundle, box, article or package of any description, without either delivering to the consignor thereof a printed receipt having stamped or affixed thereon, a stamp denoting the duty imposed by this act, or without affixing thereto an adhesive stamp or stamps denoting such duty, and in default thereof, shall incur a penalty of ten dollars, provided," &c.

Schedule B, p. 481.

"*Express.* For every receipt or stamp issued, or issued by any express company or carrier, or person whose occupation it is to act as such, for all boxes, bales, packages, articles or bundles, for the transportation of which said company, carrier or person shall receive a compensation of not over twenty-five cents, one cent.

"When such compensation exceeds the sum of twenty-five cents, and not over one dollar, two cents.

"When one or more packages are sent to the same address at the same time, and the compensation therefor exceeds one dollar, five cents."

This act, in so far as it applied to Express Companies, continued in force until March 3rd, 1863, when such act was repealed, and a gross tax was imposed upon the receipts "*of such express business,*" *as follows:* (*U. S. Revised Statutes at Large, Vol. 12, p. 722, Section 10.*)

"Section 10. And be it further enacted, that on and after the first day of April, 1863, any person or persons, firms, companies or corporations, carrying on or doing an express business, shall, in lieu of the tax and stamp duties imposed by existing laws, be subject to, and pay a duty

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of two percentum on the gross amount of all the receipts of such express business, and shall be subject to the same provisions, rules and penalties, as are prescribed in section 80, of the act to which this is an amendment, for the persons, firms, companies or corporations, owning or possessing, or having the management of railroads, steamboats and ferryboats; and all acts or parts of acts inconsistent herewith, are hereby repealed."

This latter act continued in force until June 30th, 1864, when Congress passed another act (*U. S. Revised Statutes at Large, Vol. 13, p. 276*:)

"*Express Companies.* Sec. 104. And be it further enacted, that any person, firm, company or corporation, carrying on and doing an express business, shall be subject to, and pay a duty of three percentum on the gross amount of all the receipts of such express business."

The intent of Congress under the previous acts of 1862, 1863 and 1864, would seem to be clear; that is, to impose the tax upon the companies themselves; or, in other words, upon the "express business."

The act of 1862, providing for a stamp upon every receipt issued by an express company, and of 1863 and 1864, imposing a gross tax upon the earnings of the company, were clearly taxes to be paid by the express companies.

The history of these different enactments is well stated by Mr. Seward in his brief in the case of *DeBarre vs. Livingstone, 48 Barb., (N. Y.) 511-515*, where, after considering the various acts, he says:

"So the companies found themselves doubly taxed; once on their gross receipts, and once for the stamp duty so specifically laid in Schedule B, as to exclude the idea they were also to pay a further duty of five cents as an agreement stamp.

"The companies rebelled against this, and refusing to stamp, were sued, and their agents were indicted. Appli-

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cation was made for relief to the commissioner, upon the ground that Mr. Fessenden, then Secretary of the Treasury, had advised the companies that the imposition of a stamp duty on their receipts, was unintentional, and that they need not comply with the law.

"The commissioner was also asked what amount of stamp was required to be placed upon the express receipts. His answer was as follows: * * * 'I think that the excise act requires that each particular receipt shall be stamped with a two cent stamp, and that I have no authority to accept a composition for the amount of duties which have accrued, or which shall hereafter accrue, exeept by way of compromise of suits that have been instituted. An unstamped receipt is not admissible as evidence, and therefore cannot be used as a discharge of the company, nor can it be used for any purpose in a court of justice.

"The express companies complied with this decision, and used a two cent stamp until the next session of Congress, *when they applied to be relieved therefrom.* Such relief was granted by the act of Congress of March 3rd, 1865, entitled, 'An Act to amend the Act' of June 30th, 1864. * * * * Since this act went into effect, the express companies have not been required to stamp their receipts."

The court held in that case, that a receipt, such as is usually given by express companies, was not an agreement within the meaning of the stamp act requiring a stamp of five cents; and, among other things, say:

"The act of 1863, repealed all duties by way of stamps against express companies, and substituted in its place, a duty of two per cent. on the gross amount of all receipts of the express business, and all acts unconnected therewith were repealed."

"The act of 1864, which was a new act in place of the former internal revenue act, again enacted a duty of two

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cents on receipts for property to be delivered, which were again excepted from liability, to a stamp of five cents on an agreement. But this was in 1865, again relieved by an exception in favor of these companies. This whole course of legislation shows that the receipts ordinarily given by these companies was not intended to be changed at any time beyond two cents duty, and while the duty on the gross receipts was exacted that no duty was to be charged on the receipt."

The stamp act of 1898, is a practical repetition (except as to amount) of the acts of 1862, 1863 and 1864, enacted for like purposes, and it would seem when the history and purposes of these two acts are considered, that it was clearly the intent of Congress to impose this tax *as a tax upon the business of transportation*, and that it was clearly intended that the receipt for merchandise should be issued and stamped by the carrier.

There is reason for such a construction. These express companies are public corporations or associations, and carry on their business through public franchises, agencies and privileges. They receive governmental protection, and should bear their proportion of the public burdens imposed by the war revenue act, the same as the humble citizen who receives similar protection. No reason has been urged, and we are aware of none, which should exempt a corporation of this character from sharing the burdens of important governmental functions, the same as the individual citizen.

Bearing upon this phase of the question, we take the liberty of quoting the following from Mr. Commissioner Atkinson, State R. R. Commissioner of Georgia, who states the reasons for imposing this liability on the express companies as well as other public agencies, clearly, forcibly, logically, and we submit irresistibly.

"Aside from these considerations, when we take the

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broader view and consider the circumstances under which, and purposes for which this bill was passed; when we consider that the country was just engaging in a conflict with a great and powerful nation, that in consequence it was necessary to raise by taxation enormous sums of money to maintain the national military and naval forces and equipment, and that, in order to raise this money, it was necessary to bring under the taxing power all the resources of all the people; that every industry and every person, even in the most trivial domestic and business concerns are required by the system of stamp taxation devised, to contribute to this common fund; that it is so far reaching in its effect, that none could escape the exactions of the tax gatherer, it is not conceivable that the Federal Congress should have selected great transportation companies of the country as the sole object of special legislative benefaction, and taxing all others, exempt them alone from the operation of the law. If it be ultimately held that the carrier is not liable for this tax, he is excused from all contribution to the general fund, for while other corporations are taxed upon special transactions, and upon gross and net receipts these corporations are exempted from that class of taxes, and throughout the whole scheme of this elaborate piece of legislation, there is no provision which by any possibility can be so extended as to impose upon the carrying companies of the country any portion of the common burden. It is submitted that to attribute to the Congress such a purpose, would be to deny to it credit for either patriotism, or a proper sense of justice. The better conclusion is, that when the Congress required carriers to issue a bill of lading to every shipper, its purpose was to require the issue of such evidence of contract of affreightment as would enable the shipper to enforce the duty of carriers, and since affixing the stamp, was necessary to the completion of such a bill of lading, the

duty was by necessary implication, imposed upon the carrier, of furnishing and canceling it."

Telephone companies, are required under the act, to pay a tax of one cent upon each message transmitted over their respective lines, for which a charge of fifteen cents or more was imposed, and no reason is perceived why a public agency of this character should be required to pay the stamp tax, while another public agency, carrying or transmitting packages, instead of messages, should escape the obligation of sharing this public burden.

Each is alike interested in vindicating and protecting the national honor, and each alike receives the benefits which spring from it.

The act of 1898, in question, has received the interpretation of various officials connected with either the state or national governments, and so far as we are aware, such interpretation is uniformly in favor of the contention that the tax is imposed against the express companies, and that such companies must affix the stamp.

The matter is very clearly presented by the Railroad Commission of Georgia, in a proceeding against the Southern Express Company, to prevent it from attempting to compel its shippers to pay the amount of the tax.

This commission says, among other things:

"The person expressly charged with the duty to issue the bill of lading, is also impressed with the implied duty of providing the agencies and instrumentalities necessarily incidental to the performance of the duty expressly enjoined. Since he is bound to issue a bill of lading, and cannot issue it without its being first stamped, the duty of stamping is necessarily incidental to, and consequently included in, the duty to issue. * * * If it had been the intention of the Federal Congress to require of the carrier no more than the delivery to the consignor of the unstamped bill of lading, then the penalty of failure to

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stamp and cancel the same, would most naturally have been directed against the person who had, in accepting the bill of lading subsequently failed to stamp it."

Assistant Attorney General Boyd, in an opinion rendered in July, 1898, says:

"The purpose of the law is clear. It was to tax the carrier, and not the shipper, and these provisions undoubtedly fix upon the express companies and other carriers the duty of providing, affixing and canceling the stamp; and their failure to so provide, affix and cancel such stamp, subjects them to the penalties provided by law."

We are advised that the same ruling is made by U. S. Commissioner Hunter, of Ottumwa, Iowa, and by the Attorney General of Texas.

If our contention that Congress intended to impose upon the express company the obligation to pay the stamp tax for all merchandise accepted by it for transportation, is correct, then the only question remaining under the act, in our view, is whether or not the company can shield itself from this obligation by refusing to *accept* goods for transportation, unless the stamp tax is paid by the shipper

This involves apparently two questions:

(a) The common law obligation of the respondent to receive for carriage, and to carry the goods of any person tendered to it for transportation, upon the ordinary charges being paid or tendered; and

(b) The right to avoid this obligation or duty of providing the stamp tax, *under the guise of regulating rates, by which the obligation shall be imposed upon the shipper.*

We have already, heretofore, discussed in our brief, the obligation of the company, as a common carrier, to re-

ceive for carriage and to carry all goods of any person tendered to it for transportation, upon the payment of proper charges, (ante, p. 10, *et seq.*,) and the authorities seem to sustain this proposition to its fullest extent.

Can the company relieve itself of this obligation under the guise of regulating rates?

As said by the Supreme Court of Michigan: "The pretense that raising the charges on each package just one cent, without reference to the distance to be carried, the weight or bulk of the package, and the former fixed charges, is a regulation of charges, can hardly be treated seriously."

There has in fact been no *regulation* of rates, and it is idle for the company to so contend. The only so-called regulation consists in charging the shippers, in each instance, with the amount of the stamp tax, and requiring payment in advance.

In paragraph 9, of respondents' answer, it says: "That under its right to regulate its manner of doing business, and to regulate its rates, and with a view, as far as possible, under the circumstances, of accommodating the public, so far as paying said increase of rates, *respondent has accorded to responsible shippers, the right to pay such increase, (either using a stamp or money for the purpose,) upon delivery of the goods, and the privilege of paying the balance of the rate of transportation at the point of delivery to the consignee.*"

Paragraph 10: "*Respondent admits that the regulation of its business affairs and change in its rate of transportation as above stated, in effect throws the burden of the said tax upon the shipper by force of circumstances.*"

It is apparent, therefore, that there has been no regulation of rates, so-called, but an arrangement whereby the amount of the stamp tax,—in each instance one cent,—is

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imposed upon the shipper, irrespective of distance, weight or bulk of package, and former fixed charges. "Where the charge established was 25 cents, it is now 26 cents; where it was 50 cents it is now 51 cents; where $1.00 it is now $1.01, and so on, adding just one cent to each charge."

In considering this question, the Supreme Court of Michigan say:

> "It is apparent upon the face of this proceeding, that the very purpose of this change in the regulations, and the increase of rates, is to avoid the payment of the tax, and thus cast upon the shippers the burden which the act of Congress puts upon the company. *This is but an evasion, and a subterfuge to avoid the terms of the act.* The pretense that raising the charges on each package just one cent without reference to the distance to be carried, the weight or bulk of the package, and the former fixed charges, is a regulation of charges, can hardly be treated seriously."

Judge Tuley says:

> "It is apparent, therefore, that in demanding this tax of the shippers, the express company has made no revision of its rates, nor in fact fixed any increased rate, and that it is simply an effort of the express company to make the shippers pay the tax, levied, as I have stated, upon the business transactions of the company, by the agency or means of a stamp tax upon the bills of lading, which the company is required to issue. It is not a revised increase of rate, because it adds to the former rate the same amount in each case or transaction." * * * *

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"The power to revise its rates and fix a reasonable charge, or rate, does not authorize it to arbitrarily increase all its rates by a horizontal increase thereof, without regard to whether such increase leaves a rate as to any particular shipment, a reasonable or unreasonable one.

The stamp tax is necessarily an arbitrary one. It may be imposed by the government without regard to values or the amount of the transaction, or the cost or expense attending the transaction. *The tax is the same on a receipt for a parcel that may be delivered by hand within a block or two, as it is on a receipt for a package that has to be several times handled and carried thousands of miles by the express company.* The express company has not the power of the national government, and can not, in a like arbitrary manner, add to its rate for performing its duties as a common carrier.

If it is an increase of rate, this is what it has attempted to do, but, as before stated, it is not in fact a revision or increase of rates, but it is an arbitrary attempt of the company to make the shipper pay a tax which the law requires the company to pay. The court must regard the substance of the contention and not the pretense."

Judge Frazer, of the Michigan Circuit Court, delivered a clear and comprehensive opinion in this matter.

Upon this question of regulation of rates, he says:

"It is true, as I look at this question, that the Express Company, the respondent, had a

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right to determine, within reasonable limits, what its charges would be for the transportation of goods through its office or offices ; but the right to determine and make reasonable charges for the transportation of goods is, in my opinion, a different thing from the increase of rates which had heretofore been deemed reasonable, for the purpose of avoiding the payment of the tax directed by Congress for raising of revenue for the carrying on of the war. *In my opinion, this increase of amount charged for the transportation of packages, is not in any sense for the purpose of meeting any additional expense that the Express Company may be put to for the carring or transportation of these packages, but was added for the express purpose, as is practically admitted in this case, of transferring the burden of paying a portion of the revenue necessary to carry on the war from the shoulders of the Express Company to those of its patrons.* The raising of the rate of one cent upon each parcel is, in effect, to impede the operation of the law, and therefore illegal. I do not believe, under any view that may be taken of the law, that any court could properly encourage a corporation or person in thus avoiding a duty which is clearly imposed upon it by the act of Congress. *It would be against public policy to allow the just burden imposed by the law-making power to thus avoid it, and it is clearly apparent to the court that this was the intention of the respondent.* It may be burdensome upon the respondent to have to pay this tax. All taxes

> are burdensome. But, as it is imposed clearly by the law making-power, it is the duty of the courts, regardless of consequences, to enforce it." (post, p. p.)

While it may be conceded that the Express Company, as a common carrier, has the authority in general to fix, regulate and establish rates, yet the rule unquestionably is, that any increase or regulation *must be reasonable.*

> "As they hold themselves to the world as common carriers for reasonable compensation, they assume to do and are bound to do what is required of them in the course of their employment, if they have the requisite conveyances to carry, or are offered a reasonable or customary price."
>
> *Kent's Com., (13 Ed.,) Vol. 2, p. 599.*
> *Express Co. vs. Maine Cent. R. Co., 57 Maine, 188.*
> *Am. & Eng. Ency of Law, Vol. 8. pp. 902-928.*

In *C. B. & Q. R. R. Co. vs. Iowa, 94 U. S., 155,* this court, in referring to railroad companies as carriers for hire, say :

> "This company, in the transaction of its business, has the same rights and is subject to the same control as private individuals under the same circumstances. It must carry, when called upon to do so, and *can charge only a reasonable sum for the carriage.*"

The criterion, therefore is, whether the attempt of the Express Company to shirk its responsibility for this public burden, in common with other corporations and individuals, and to shift the burden and responsibility upon

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shippers and consignors, *is a reasonable regulation of rates.*

We submit that it is not so; that the company, therefore, cannot refuse to perform this common law obligation of accepting and transporting merchandise which, according to the showing in this case, it has refused to do.

The government has refused to interfere in the matter of compelling the express companies to perform its obligations as a carrier. It holds, substantially, that it is interested only in the question of the payment of the stamp tax, in case of actual shipment. The company has refused to perform its obligations which it owes to the public as such.

The Supreme Court of Michigan affirmed the order of the lower court granting a mandamus upon the company compelling it to perform this common law duty. We submit that this decision was correct, and that the judgment should be affirmed.

III.

We hesitate to enter upon a discussion of other points made by respondent's counsel in the court below. At the time of preparing this brief, we have not been served with a brief in behalf of plaintiff in error, and we are, therefore, unable to determine definitely what points will be presented by counsel for the respondent.

This court is only interested in the "*Federal question*," if such exists, and has been properly presented in this controversy.

Barbier vs. Connolly, 113 U. S., 27.
Ashley vs. Ryan, 153 U. S., 436.
Watson vs. Mercier, 8 Peters, 88.

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In the petition for the writ of error, counsel contends that the Circuit Court had no jurisdiction to hear and determine said matter, and that, under the facts set forth in the answer, the court should have dismissed the application.

It was contended upon the argument in the Supreme Court of Michigan:

1st. That the defendant was a "*joint stock association*," and therefore was not governed by the Michigan practice under Circuit Court Rule 46, providing that *Circuit Courts shall have jurisdiction within their respective counties in all mandamus proceedings involving*" * * * "*the actions of any private corporation or officer or board thereof.*"

2nd. That the petition was not filed by the Attorney General at the relation of the people of the State, but upon the relation of private parties named therein as commercial partnerships.

3rd. That the petition showed no such interest in the petitioners as justly called for the interference of the court by the writ of *mandamus*.

4th. That the Federal Courts had exclusive jurisdiction of the controversy.

The Supreme Court of Michigan disposed of all of these questions adversely to the respondent.

FEDERAL COURTS HAVE NOT EXCLUSIVE JURISDICTION.

Referring to the point, that the Federal Courts had exclusive jurisdiction, the court say:

> "This is not an action for the recovery of the penalty which the statute imposes for failure to issue the bill of lading, but a proceeding for an order to compel the respondent, a common carrier, to accept and carry the

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goods tendered it for shipment when the regular charges are paid or tendered. The respondent is a common carrier, and as such, it is its duty to receive for carriage and to carry the goods of any person tendered to it for transmission, provided they are such as it holds itself out as willing to carry, and the party tendering them offers to pay its proper charges. The respondent is permitted to do business in this state, though not incorporated under the laws of the state, but it is subject to all the duties and obligations which the law imposes upon common carriers; and for a refusal to carry goods, when tendered and charges paid, the State courts may be appealed to for redress. This matter is entirely between the shippers and the company. This view is held by the Attorney General of the United States, in a recent opinion, in which he says, 'In all controversies arising between the shippers and express companies as to which one shall be required to bear the expense of the stamp, the general government has no direct concern under the war revenue law.'" * * * "The commissioner of internal revenue on August 1st, 1898, decided that the aggrieved parties, that is, the parties offering goods for shipment, when the company refuses to carry without payment of the stamp, *must depend for redress upon the common or the statute law of the State defining the obligations of common carriers.*"

The logic of this opinion we submit is irresistible.

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PROPRIETY OF WRIT OF MANDAMUS.

Referring to the propriety of the writ of *mandamus* to enforce the common law duty enjoined upon the common carriers, the Michigan court say:

> "The company is vested with the exercise of public functions under the permissive power of the State; and when it refuses to discharge the duties imposed by law, *mandamus* is the proper remedy to compel the discharge of that duty. The American courts have taken such occupations under their control, and, regarding them as public agencies, have enforced the common law, or the statutory law against them, and have not hesitated to grant the writ of mandamus against any party who, having assumed public duties, refuses to discharge them. Haugen *vs.* Water Co., 28 Pac., 244; Olmsted *vs.* Proprietors, etc., 47 N. J. Law, 311."

The propriety of the writ would seem to be clear. The respondent, vested with the exercise of these public functions, under the permissive power of the State, declines to perform them, unless the shipper shall pay the tax which, if our contention be correct, the company is bound to pay.

Mandamus is the usual and ordinary remedy, and its propriety is evident.

When a carrier refuses to discharge its duty to receive and carry freight, a *mandamus* or mandatory injunction may issue, at the suit of the State, to compel the discharge of such duties. Such a company, being a *quasi* public institution, is subject to especial obligations, and it is no defense to an application for such a writ, that the State has

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suffered no injury, and that private persons have an adequate remedy by suit at law.

Am. & Eng. Ency. of Law, Vol. 5, 2nd Ed., p. 162, par. 2.

Am. & Eng. Ency. of Law, Vol. 5, 2nd Ed., p. 161.

People vs. N. Y. Central, &c., Co., 28 Hun. (N. Y.,) 543.

Abbott vs. Johnston, &c., Co., 80 N. Y., 31.

Union Pacific R. R. Co. vs. Hall, 91 U. S., 343.

State vs. Hartford, 29 Conn., 538.

Ex parte Attorney General, 17 New Brunswick, 667.

Railroad Com'rs vs. Portland, &c., Co. 63 Maine, 269.

People vs. Colorado Central, &c., R'y Co., 42 F. R., 638.

Chicago, &c., R. R. Co., vs. Burlington, &c., R. R. Co., 34 F. R., 481.

Payne vs. Kansas, &c., R. R. Co., 46 F. R., 546.

People, &c., vs. N. Y. Central & Hudson R. R. Co., 28 Hun., 543, is a well considered case upon this subject. The court, per Davis, J., considers the obligations of common carriers in analogous cases at length, *and holds that there is no doubt that a railroad company is compellable, by mandamus, to exercise its duty as a carrier of freight and passengers; and that this duty may be enforced by the Attorney General of the state, in behalf of the people, and that even though the injured party, as a suitor, has an adequate remedy by private action for damages, yet*

that this does not preclude the state from its remedy by mandamus.

This public duty has been frequently enforced in the case of telephone companies, and it is held that such companies, being common carriers of news, all persons are entitled to equal facilities in the enjoyment of the benefits to be derived from the use of the telephone, *and that a writ of mandamus will issue to compel such company to furnish such person with the necessary instruments.*

State vs. Telephone Co., 17 Neb., 126.
Central Union Tel. Co. vs. Bradbury, 106 Ind., 1.
Central Union Tel. Co. vs. State, 118 Ind., 194.
Commercial Union Tel. Co. vs. New England Tel. Co., 17 At. Rep., 1071.
State vs. Telephone Co., 23 F. R., 539.
Telephone Co. vs. Com., 3 Atl. Rep., 825.

In *State vs. Hartford, &c., R. R. Co., 29 Conn., 538,* it was held that a *mandamus* was properly applied for by the *Attorney General* of the state, to compel a railroad company to run passenger trains to its original terminus.

The court say:

> "*All jurists and judges will at once agree that chartered companies are obliged fairly and fully to carry out the objects for which they are created, and that they can be compelled by mandamus to do it.*"

See also:

People, ex rel Garbutt, vs. Railroad Co., 14 Hun (N. Y.,) 371.
People, &c., vs. N. Y., &c., R. R. Co., 40 Hun., 571.

People, ex rel Town, vs. Troy, &c., R'y Co., 37 How. Pr., (N. Y.,) 427.
State vs. Wilmington Bridge Co., 3 Har. Rep. (Del.), 312.

In Michigan, the rule is, we think, clear that a proceeding of this character must be instituted by the Attorney General of the state, unless the private or particular interest to be subserved by the individual, is to be preserved and protected, *independent of that which he holds in common with the public at large, and that it is for the public officers exclusively to apply, where public rights are to be subserved.*

People vs. Inspectors, 4 Mich., 187.
Smith vs. City of Saginaw, 81 Mich., 123.
People vs. Regents, 4 Mich., 98.
People vs. Green, 29 Mich., 121.
People vs. Supervisors, 38 Mich., 421.
People vs. State Auditors, 42 Mich., 422.

In *People vs. N. Y., &c.. R. R. Co., 28 Hun., (N. Y.), 543-553*, a mandamus was applied for and granted, requiring railroad company to discharge its duty as a common carrier, by promptly receiving, transporting and delivering all freight. It was contended that the state was not injured, and had no interest in the question.

The court say:

> "The state may suffer no direct pecuniary injury, as it may not by the neglect of one or more of its numerous political officers who hold in trust for the people the official duties reposed in their hands; but that is no test of the power or duty of the state in either case. *The sovereignty of the state is injured whenever any public function vested by it in any*

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person, natural or artificial, for the common good, is not used or is misused, or is abused; and it is not bound to inquire whether some one or more of its citizens has not thereby received a special injury for which he may recover damages in his private suit. Such an injury wounds the sovereignty of the state, and thereby, in a legal sense, injures the entire body politic. The state, in such a case as this, has no other adequate remedy. It may proceed, it is true, to annul the corporation, as has been held in many cases where corporations had neglected public duties."

Citing cases:

"*But that remedy is not adequate, for it only destroys functions where the public interests require their continued existence and enforcement. It has, therefore, an election which of these remedies to pursue.*

"Undoubtedly a sound discretion is vested in its law officer to decide whether the exigency is such as to call for the use of either remedy, as it is ultimately for the court to judge whether the elected remedy should be applied. But upon the question of power, and of sufficient legal injury to justify its use, where the corporation neglects or refuses to exercise its franchises or perform its duties, there seems to us no reason to doubt."

The function which the express company refuses to exercise is a public one. The interest sought to be subserved is common to all the people of the state. The sovereignty of the state is wounded by the refusal of the express company to perform its duty as a common carrier,

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as contemplated by the state, when it permitted the company to come within its borders and carry on its business. The injury is common, and the course and practice of the respondent, as admitted by its answer, is uniform. (Pet., Par. 8; Ans. Par. 2.)

SCOPE OF THE WRIT.

It is further contended that the scope of the writ of mandamus, as granted by the lower court, is too broad; and that such court had no right to enforce the performance of duty by the respondent company, *except as to the particular relators mentioned in the petition.*

Regarding this contention, the Supreme Court of Michigan say:

> "The petition is filed by the attorney general of the state, in which it is stated that these cases constitute but few of the many of like character, and are presented for the purpose of representing the uniform course of practice of the respondent company. This is not denied by the answer, but, on the contrary, the claim is made therein that the regulation of its business affairs and change in its rates of transportation, throw the burden of the tax upon the shipper by force of circumstances. It is thus apparent that the attorney general's petition, taken with the answer of the respondent, is sufficient to show that the respondent is attempting to enforce this rule throughout the state in its dealings with all its customers, and the case involves the question whether the order should be broad enough to reach the rights of all classes who are shippers within the state. We think the order should not be modified as claimed."

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This question should present no practical difficulty. A proceeding by mandamus of this character is analogous to a proceeding by the attorney general of the state on the relation of tax payers, to set aside or vacate a tax.

The attorney general may institute the suit with perfect propriety of his own volition, and the fact that the suit is upon the relation of certain persons, is of no particular significance. A bill filed by the attorney general, or by certain citizens as tax payers, to restrain the collection of an invalid tax, is set aside and vacated as to the entire tax payers, and not in favor of those only who happen to be relators.

In the case at bar, the proceeding is instituted by the attorney general of the state, setting out in fact the exercise of public functions by respondent as a corporation.

As said in the case of *People, &c., vs. N. Y. C. & C. R. R. Co., supra*, the acts of the respondent, in refusing to exercise this public function by receiving, accepting and transmitting merchandise, unless the public pays the burden, which the law imposed upon it as an express company, wounds the sovereignty of the state in a legal sense, and it is not only the right, but the duty of the state to interfere.

In *Merrill on Mandamus, Sec. 25*, the author says that American courts have taken such occupations under control, and, regarding them as public agencies, have enforced the common law, or statutory law, against them, and have not hesitated to grant the writ of mandamus against any party who, having assumed public duties, endeavored to be partial in the performance of such duties, and attempted to give one party an advantage over another. Citing:

Nash vs. Page, 80 Ky., 539.
People vs. King, 110 N. Y., 418.
People vs. Budd, 117 N. Y., 1.

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Chicago, etc., R. R. Co. vs. Iowa, 94 U. S., 155.
Peik vs. Chicago, etc., R. R., 94 U. S., 164.

The precise question, however, was considered in the case of *People, etc., vs. N. Y. C. & H. R. R. R. Co., 28 Hun., 543-559*, where the court say :

> "We are not able to perceive the difficulties that embarrassed the court below as to the form of a writ of mandamus in such cases. It is true the writ must be specific as to the thing to be done; but the thing to be done in this case was to resume the duties of carriers of the goods and property offered for transportation; that is, to receive, carry and deliver the same under the existing rules and regulations as the business had been accustomed to be done. There was no necessity to specify what kind of goods should be first received and carried, or whose goods, or indeed to take any notice of the details of the established usages of the companies. It was the people who were invoking the writ on their own behalf, and not for some private suitor, or to redress individual injuries. The prayer of the petition indicated the proper form of the writ."

This language is so apt and so forcible, and meets the proposition so squarely, that other argument would seem to be unnecessary.

POWER OF THE COURT BELOW.

Regarding the contention that the circuit courts of the state had no power to issue the writ of mandamus, inasmuch

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as circuit court rule 46 conferred jurisdiction in mandamus proceedings upon the circuit courts of the state involving the actions of private corporations only, and that, therefore, the rule did not apply to "*joint stock associations*." the Supreme Court of Michigan say :

> " 'Corporations' and 'associations' are convertible, and often used as synonymous terms. There is no reason for any distinction or discrimination between corporations and joint stock associations, in applying this rule. It is the intent of the rule to place all mandamus proceedings of this character primarily in the circuit courts. In reference to the assessment and collection of specific taxes, the legislature of this state has recognized the terms as convertible. Section 1255, 1 How. Stat., provides, 'The term *corporation*, as used in this act, shall be construed to include all associations and joint stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships.' In *Maltz vs. Express Co., 1 Flip., 611, Fed. Cas. No. 9002*, it was held, that whether a corporation or not, a joint stock association is a distinct legal entity, and that so long as this fact exists, and it possesses the attributes of perpetual succession, and the capacity of suing and being sued, it is a judicial person, and must be regarded as a citizen of the state which creates it ; and it is wholly immaterial whether it be termed an 'association,' 'joint stock association,' or 'guild.' "

There is no reason for any distinction or discrimination as between a corporation and a joint stock associa-

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tion. The word "corporation" is a convertible term, and is used as synonymous with the term "joint stock association." This term, "association" is used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise.

Am. & Eng. Ency. of Law, Vol. 3, 2nd Ed., p. 162.

The term corporation is frequently construed to include all associations and joint stock companies, having any of the powers or privileges of corporations not possessed by individuals or partnerships.

See *Howell's Statutes, Vol. 1, Sec. 1255.*

The *Constitution of the State of New York* provides as follows:

"Article VIII.

"Sec. 1. Corporations may be formed under the general laws; but shall not be created by special act *except for municipal purposes*," &c.

"Sec. 3. The term *corporation*, as used in this article, shall be construed to include *all associations and joint stock companies having any of the powers or privileges of corporations*, not possessed by individuals or partnerships," &c.

In *Sandford vs. Supervisors, 15 How. Pr., 172*, it is held that joint stock associations, being corporations within the meaning of the constitution, they are liable to taxation on their capital like all other corporations.

At p. 176, the court say:

> "I think, therefore, that in obedience to the express mandate of the constitution and to long and well established legal principles,

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we must hold that these associations or companies, formed under these general laws, are corporations, and that if the legislature has declared that such associations shall not be corporations, after conferring on them, in accordance with the constitution, some of the powers and privileges of corporations, and which admit that if any such powers and privileges are conferred, they shall be deemed corporations, such legislative declaration must yield to the constitution and be regarded as inoperative." * * * *

"Having arrived at the conclusion that *this joint stock association is a corporation*, within the meaning of the constitution, it follows that it is liable to taxation on its capital like all other corporations." Citing,

Mutual Ins. Co. vs. Supervisors, 4 Com., 444.

In England and in this country, the law of joint stock companies is largely regulated by statute. The powers conferred upon them by these enactments are such that for many purposes *they are held to be corporations*, even though they have nowhere been designated as such, and though the statutes relating to joint stock companies do not so designate them.

Beach on Private Corporations, Vol. 1, Sec. 167.
Oliver vs. Ins. Co., 100 Mass., 531.
Thomas vs. Dakin, 22 Wend., 9.
Supervisors vs. The People, 7 Hill, 504.
Leavitt vs. Blatchford, 17 N. Y., 521, 529.
Talmage vs. Pell, 7 N. Y., 328.
Gillett vs. Moody, 3 N. Y., 479.

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Gifford vs. Livingston, 2 Denio, 380.
Case vs. Mechanics' Banking Ass'n, 1 Sandf., 693.
Cutler vs. Sanford, 8 Barb., 225.
Bank, &c., vs. Watertown, 25 Wend. 686.
In Re Bank of Dansville, 6 Hill, 370.
People vs. Niagara, 4 Hill, 20,
Willoughby, vs. Comstock, 3 Hill, 389.
People vs. Watertown, 1 Hill, 616.
People vs. Wemple, 52 Hun., 434.

In *U. S. vs. Trinidad Coal Co.*, 137 U. S., 160, a *corporation* was held an *association* of persons within the meaning of the U. S. statutes relating to the vacant coal lands of the government, and as such was subject to the restriction as to the number of acres of such land that might be entered in its name.

In this case, the court say :

> "The reasons that suggested the prohibitions in respect to *associations* of persons apply equally to *incorporated and unincorporated* associations; but the purpose of the government would be defeated altogether if it should be held that *corporations* were not *associations* of persons, within the meaning of the statute."

In *Maltz vs. American Express Co.*, 1 *Flippin*, (*U. S. C. C.*,) 611, it was held that whether a corporation or not, a joint stock association is a distinct legal entity, and so long as this fact exists, and it possesses the attributes of perpetual succession, and the capacity of suing, and being sued, it is a judicial person, and must be regarded as a citizen of the state which creates it.

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The court say :

> "I deem it wholly immaterial whether it be termed an *association, joint stock association* or guild."

In *Am. & Eng. Ency. of Law, Vol. 11, 1st Ed., p. 1054, note 2*, the author says :

> "It seems to comport with reason that when an association of persons assume a name which implies a corporate body, and exercises corporate powers, they should not be heard to deny that they are a corporation." Citing :
>
> *U. S. Express Co. vs. Bedbury, 34 Ill., 459.*
>
> *Clarkson vs. Erie & North Shore Dispatch, 6 Bradw., (Ill.), 284.*

The word "association" is said to signify "confederacy or union for particular purposes, good or ill." *Johns. Dict.*

In that sense it is a generic term, and may indifferently comprehend a voluntary confederacy, which is a partnership dissoluble by the persons who formed it, *or a corporate confederacy*, deriving its existence from a statute, and dissoluble only by the law.

See *Thomas vs. Dakin, 22 Wend., 104.*
Exchange Bank vs. Hines, 3 Ohio State, 32.

In New York, associations, under the general banking law of the state, are corporations.

Niagara County vs. People, 7 Hill, 504.
Gillett vs. Moody, 3 N. Y., 479.
Talmage vs. Pell, 7 N. Y. 328.

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In *Lee Mutual Fire Ins. Co. vs. State, 60 Miss., 398*, associations and companies were held to be *synonymous.*

Grotius called a corporation "*consociatio,*" which signifies "*association,*" and applied the term to a people which is properly considered a corporation in respect to its powers with respect to individual action and ownership.

See *Thomas vs. Dakin, 22 Wend., 104.*

People ex rel Clap vs. Wemple, 52 Hun. (N. Y.) 434.

In this case, the U. S. Express Company refused to make reports to the controller of the city of New York, and the controller thereupon proceeded to settle, fix and determine the amount of taxes and penalties due and unpaid from said company to the state of New York.

The question presented was whether the U. S. Express Company was taxable under the 3rd section of Chapter 542, of the Laws of 1880. The express company was an association formed by articles of agreement, signed by five or more persons.

The court say, p. 438:

> "*The word corporation may sometimes be used to include joint stock companies, so it may not be inconsistent to speak of a joint stock company as being also a corporation.*"

After referring to the case of *People vs. Home Ins. Co., 92 N. Y., 329*, the court say:

> "The very section in question used the *words* 'corporate franchises or business,' after naming the bodies subject to the tax, and if anything is to be drawn from that opinion it is *that these joint stock associations are corporations*, for the court say, at page 340, that the aforesaid act of 1881, after describing a corporation subject to its pro-

visions, continues as follows: *thus including joint stock companies and associations under that name of corporations.*"

The answer practically concedes our contention, because it says, (paragraph 7) that the respondent, regularly organized and existing under and by virtue of the laws of New York, and acting under regularly issued license of this state, by its organization and compliance with the laws of the state, as admitted in paragraph 5 of said petition to have been done, *became vested with the right to exist in a corporate capacity.*

The Supreme Court of Michigan, which established and adopted the rule, has construed it to apply to joint stock associations, and we submit that this is conclusive upon this question.

The writ of mandamus, as granted by the court below, required the company—

"So long as you, the said American Express Company, shall continue to do business in the State of Michigan, that immediately after the receipt of this, our writ, you do receive and accept for transportation and delivery, any and all goods, wares and merchandise offered or tendered to you, the said express company, whether in boxes, bales, packages or bundles, or not so enclosed or included, as a carrier, from point to point, upon the lines of said company, upon the usual fees therefor being paid or tendered by the shipper, or consignor, his agent or servant, and to issue to the said shippers or consignors, or their agents, or the persons from whom any goods shall be delivered as aforesaid for transportation, a bill of lading, manifest, or other evidence of receipt or forwarding for each shipment received for carriage or transportation, with a revenue stamp of the value of one cent duly at-

tached thereto, and canceled as provided by an Act of Congress, entitled, 'An Act to Provide Ways and Means to Meet War Expenditures, and for other purposes,' approved June 13th, A. D. 1898, and without requiring a stamp of the value of one cent, or the equivalent thereof provided by said Act of Congress to be furnished by said shipper or consignor, or his agent or servant."

The company had refused to perform a public duty. The attorney general, representing the people of the state, on the relation of certain firms (who should be responsible for costs) instituted these proceedings. The relators were only important as mediums for setting the wheels of the court in motion. The relief was sought in behalf of the entire public, who were affected by the action of this company in the exercise of a public function, and to hold that the relief in such cases can apply only to the particular relators upon whose motion the proceedings were started, would bring reproach and discredit upon the efficiency of courts of justice.

We apprehend that the court will not be disposed to consider these collateral questions, in view of the fact that they do not of themselves present any Federal question. We have presented our argument, however, upon the theory that this court might be disposed to consider some of them.

We therefore ask:

1. That the writ of error in this case be dismissed upon the ground as indicated by the motion heretofore submitted, that no Federal question has been raised by the respondent, but only the question of the common law right of the respondent to charge the tax in question over to the shipper, under the guise of regulating its rates.

2. That in case this relief shall not be granted, then that the judgment of the Supreme Court of Michigan upon the merits of the controversy, be affirmed.

C. E. WARNER,
Att'y for Def't in Error.

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APPENDIX.

OPINION OF JUDGE TULEY.

SUPERIOR COURT, COOK COUNTY.

Petition for Mandamus.

OPINION RENDERED JULY 28, 1898.

PEOPLE OF THE STATE OF ILLINOIS, EX REL. WESTERN WHEEL WORKS, a corporation *v.* THE UNITED STATES EXPRESS COMPANY.

By agreement of counsel for the respective parties, argument was heard upon above petition before the Honorable M. F. Tuley, one of the judges of the Circuit Court of Cook County, on Monday, July 25, 1898.

TULEY, J.—The relator in this case, the Western Wheel Works, an Illinois corporation, engaged in business in Chicago, it is alleged was in the habit of shipping by the defendant, the United States Express Company, a large number of packages daily, sometimes amounting to between one and two hundred a day.

About the 8th of July, 1898, and after the passage of the act of Congress, known as the "War Revenue Act," it sent a package to the office of the express company for shipment to a point called Pine Bluff, in the State of Arkansas. The rate charged by the express company had been, as appears by the evidence, forty-five cents for a package of that character, for the last six or eight years.

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When the package was tendered to the company, the evidence shows that the agent started to fill out a blank bill of lading or receipt for the shipment, and observing that the party making the shipment counted out forty-five cents to pay the charges, the agent demanded that he should pay in addition one cent for a revenue stamp to be attached to the bill of lading, and upon his refusal to do so, the company, by its agent, refused to accept the parcel for transportation.

There is some little difference in the evidence as to what occurred at the time of the presentation of the package, but there is no doubt of this fact, that the agent refused to receive the package unless the one cent for the revenue stamp was paid in addition to the forty-five cents, which is the material fact in the case.

Thereupon, this petition in the name of the People, on the relation of the Western Wheel Works was filed.

The company filed an answer denying in general all the allegations of the petition as to the facts alleged in the petition.

The question involved in this case is, upon whom, under the act of Congress, is the obligation imposed to pay the stamp tax, the express company or the shipper?

That depends, first, upon the construction to be placed primarily upon the portion of the Stamp Act, referring to and headed "Express and Freight," taken, of course, in connection with all other relative provisions of the act of Congress.

The section refers to express companies, railroad corporations, persons, etc., engaged in the business of carrier for hire, and requires them to issue bills of lading, etc., or evidence of the receipt of property, for each shipment received. It is conceded that the language is sufficiently broad to cover express company receipts, which are, in fact, nothing more than bills of lading. The section, as

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applicable to express companies, eliminating what refers to other companies, would read as follows: "It shall be the duty of every express company * * * to issue to the shipper * * * or persons from whom any goods are accepted for transportation, a bill of lading * * * for each shipment received for carriage or transportation * * * and there shall be duly attached and canceled, as in this act provided, to each of said bills of lading * * * a stamp of the value of one cent. * * * Any failure to issue such bill of lading * * * as herein provided, shall subject the express company * * * to a penalty of fifty dollars for each offense, and no such bill of lading * * * shall be used in evidence, unless it shall be duly stamped as aforesaid."

The act of Congress referred to is entitled, "An act to provide ways and means to meet war expenditures and for other purposes."

It aims to raise the revenue to meet war expenditures by taxation.

The Supreme Court of the United States, in what is called the Foreign Bond Case, 15th Wallace, uses this language in regard to the subject-matter of taxation: "The subjects of taxation are *persons*, *property* and *business;* whatever form taxation may assume, whether as duties, imports, excises or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though, as applied to them, the taxation may be exercised in a variety of ways."

The subjects of taxation referred to in the act, among others, are the railroad companies, express companies, and other common carriers, steamboats, etc., telephone, life insurance, and various other businesses and occupations.

It was not the intent to tax the corporation or *person* engaged in the express business. It was not intended to tax the *property* or capital stock employed by such cor-

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portation, or person, in such business. It must, therefore, be the *business* of the corporation or person engaged in the occupation of a common carrier which the law intends to tax. The business must be taxed, not on its receipts, nor according to its extent, but by levying and collecting a tax for and in respect of instruments (bills of lading, receipts, etc.,) mentioned in Schedule A, or for, and in respect of, the vellum, parchment or paper upon which such instrument shall be written or printed. (See Section 6.)

That is to say, the act is an exercise of the power to tax the business of the express company by way of or by means of imposing a stamp tax on its bills of lading or receipts, which it is compelled to use in the transaction of its business.

How has the law making power exercised its taxing power, and has it done so in a manner clear and free of any reasonable doubt?

The section quoted, headed "Express and Freight," makes it the duty of the express company to issue with each shipment or package received a bill of lading (or receipt, I use them interchangeably).

What is meant by "duty?" The meaning in law is "that which a person is bound by any legal obligation to pay, do or perform."

The express company is put under a legal obligation to do what? To issue a bill of lading.

What is it "to issue?" To "issue" is to send out, to send forth, as to issue an order of a commanding officer, or to issue a writ or precept of the court.

The bill of lading or receipt must be sent forth, parted with, or, in other words, issued by the express company.

Must be issued to whom? The law is clear, to the shipper, consignor, agent or person from whom the goods are accepted for transportation.

But what kind of a bill of lading is the express company under legal obligation to so issue to the shipper?

It would be an absurd conclusion to say that the company is required to issue to the shipper an unstamped bill of lading or receipt, the issuing of which is made a penal offense by section 7 of the act.

It was not the intent of the statute to place the express company under an obligation to do an illegal act. The bill of lading, or receipt, that the express company is to issue, must be a complete bill of lading, a legal instrument, and this can only be a stamped instrument. This is the clear intent of the section, because it not only requires the express company to issue a bill of lading, but proceeds, "and there shall be duly attached and canceled, as in this act provided, to each of said bills of lading * * * a stamp of the value of one cent. * * * Any failure to issue such bills of lading * * * as herein provided, shall subject the railroad, express company, etc., to a penalty of fifty dollars."

The penalty is imposed for a failure to issue a bill of lading with the stamp attached.

The word "such" qualifies all that goes before in connection with the bill of lading, and must by all rules of construction be held to mean a bill of lading with the stamp attached.

It is contended that the section quoted does not expressly state that the express company shall attach and cancel the stamp. It is, however, a necessary inference that it shall do so. It is made its duty to issue the bill of lading; it can only issue a legal bill of lading, and that is one duly stamped. The shipper has nothing to do with the issuing—the sending forth of the bill of lading. The stamp must not only be affixed, but must be "canceled," as in the act provided.

Section 9 of the act provides that "where an adhesive

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stamp shall be used for denoting the tax imposed by the act, the person using or affixing the same, shall" cancel the stamp in a certain manner therein specified.

If the duty of the express company is to issue a complete—a legal bill of lading, it must be one with the stamp affixed and canceled, and the company can only fulfill that duty by so affixing and canceling the stamp. This would appear to be a necessary inference from the duty imposed by the act.

It is contended that this construction put upon the words, "such bill of lading," would, if applied to the same words in the next following provision, prohibiting the reception by the courts of "such bills of lading," as evidence, unless duly stamped, make the law mean that no stamped bill of lading should be received as evidence. Such a construction could not be made, as it is opposed to the very spirit and intent of the act. A court is not disposed to be hypercritical as to the use of words by the legislative body if it can discover the purpose and intent of the legislature, and, if necessary, it will, in construing the act, reject as surplusage a word that is inadvertently used.

Congress has no power to prescribe to courts what they shall or shall not receive as evidence; that is so held in the case of *Craig vs. Dimick*, 57 Ill., 308. Although Congress has no power to prescribe to courts what they shall or shall not receive as evidence, the court would not construe the act as an attempt by Congress to dictate to the court what it should or should not receive in evidence, but will construe the sentence referred to, as intended to provide a further method of enforcing the payment of the stamp, and will, undoubtedly, aid the legislative power in the collection of its revenue by refusing to receive in evidence such instrument not stamped, or at least until the stamps shall have been first affixed.

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There is some language in section 6 of the act which is relied upon to show that the tax may be paid, either by the express company or by the shipper. The section provides "that there shall be levied, collected and paid for and in respect of the bonds, instruments, etc., matters and things mentioned and described in Schedule A of this act, and for or in respect of the vellum, parchment or paper upon which said instrument, matters or things, or any of them, shall be written or printed—by any person or persons or parties who shall make, sign, or issue the same, or for whose use and benefit the same shall be made, signed and issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified, or set forth in the said schedule."

These are general words applicable to all the numerous documents, instruments, business, etc., enumerated in Schedule A.

The words, "for whose use or benefit the bill of lading shall be made, signed or issued," may be held to apply to the principal, where the transaction or the making of the receipt is done by an agent or broker; but there are matters specified in Schedule A where it is clearly intended that the party for whose use or benefit the bill of lading is made, shall pay the tax, as for instance, where entries are made of goods at the custom house, and a receipt or certificate given therefor, and also entries for the withdrawal of goods or merchandise from customs bonded warehouse, and a receipt or certificate therefor given. But such general language used to designate all persons or classes of persons who may under any provision of the act be required to pay the stamp tax, will not be allowed to cast any doubt upon the express provision of the act requiring the express company to issue a receipt to the shipper.

It is, however, contended by the defense, that a common carrier may stipulate as to the terms of his contract,

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and that the court can not prescribe the terms or price of transportation by the carrier; that in demanding the payment of the tax as an addition to the fixed rate, it has only exercised its right to make and fix reasonable rates.

It must be admitted that when the increased costs of handling and transportation demand it, a common carrier has the right to revise and increase his rate, but he can not arbitrarily do so in order to make his customers or the public pay a tax imposed by law on such carrier or upon the business transacted by him.

The real contention between the shipper and the express company is as to who shall pay this tax, and the express company is endeavoring to make the shipper pay it.

The evidence shows that after the passage of the act and before it went into effect, to-wit: on June 29th, the company's general agent issued a certain circular to all shippers of fruit and produce, etc., informing them of the going into effect of the new law on July 1, 1898, and that it requires the company to see that a revenue stamp of one cent is affixed to each express receipt issued; that the company will decline to receive any shipments offered to go by express unless they are entered upon the regular express receipts used by the company, and a one cent revenue stamp affixed to each receipt, and "shippers will be expected to pay to the company one cent for each receipt isued."

A letter of instructions by the general agent was also issued about the 29th of June, with reference to the same matter. "A receipt must be given for all express matter," it states, "and stamps must be canceled with the letters, 'U. S. X.,' and date in ink, indelible pencil or rubber stamp, by the party signing the receipt; the value of the stamp must be collected from the party to whom the receipt is given."

"Canceling stamps will be furnished. Receipts for

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dead-head matter require a one cent stamp, which must be collected of shipper."

On July 1st, from the home office at New York, a general circular to all the agencies was issued in regard to the same matter, in which they are informed that a receipt must be issued "for each and every shipment of goods accepted for transportation over this company's lines." "To every receipt and duplicate thereof for a shipment of goods within the United States, there must be affixed a United States revenue stamp of the value of one cent." "The stamp, after being affixed, must be canceled by writing or stamping thereon with ink or with indelible pencil, the initials, 'U. S. X.,' and the date of the receipt." "In every case the amount of stamps must be collected from the party to whom the receipt is issued."

"Quotations of rates, etc. On and after July 1, 1898, all rates quoted must be 'plus the government stamp tax.'"

It is apparent, therefore, that in demanding this tax of the shippers, the express company has made no revision of its rates, nor in fact fixed any increased rate, and that it is simply an effort of the express company to make the shipper pay the tax levied, as I have stated, upon the business transactions of the company, by the agency or means of a stamp tax upon the bills of lading, which the company is required to issue.

It is not a revised increase of rate, because it adds to the former rate the same amount in each case or transaction.

The rate or charge, as fixed heretofore by the company, must necessarily give a larger profit in some cases than in others, and the cost of handling and transportation be greater in some than in others. It would therefore follow that in some cases the old rate for transportation might be a reasonable one, and might yield a reasonable

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profit, even if the express company should be obliged to pay this stamp tax.

The express company is a common carrier ; is carrying on a business affected with a public interest. It can not arbitrarily fix its own rates or make such a contract with each shipper as it pleases. It must treat all alike and must carry for all at a reasonable rate of charge. The power to revise its rates and fix a reasonable charge or rate does not authorize it to arbitrarily increase all its rates by a horizontal increase thereof, without regard to whether such increase leaves a rate as to any particular shipment, a reasonable or unreasonable one.

The stamp tax is necessarily an arbitrary one. It may be imposed by the government without regard to values or the amount of the transaction, or the cost or expense attending the transaction.

The tax is the same on a receipt for a parcel that may be delivered by hand within a block or two, as it is on a receipt for a package that has to be several times handled and carried thousands of miles by the express company.

The express company has not the power of the national government, and can not in a like arbitrary manner add to its rate for performing its duties as a common carrier.

If it is an increase of rate, this is what it has attempted to do ; but as before stated, it is not in fact a revision or increase of rates, but it is an arbitrary attempt of the company to make the shipper pay a tax which the law requires the company to pay. The court must regard the substance of the contention, and not the pretense

I remember, as a matter of personal recollection, that at the time of the going into effect of the Stamp Act during the War of the Rebellion, the express companies endeavored at that time to make the shipper pay the stamp tax, and the shipper did for a short time pay it, but it was soon changed, and the company paid it, whether in

pursuance of any decision or in pursuance of a ruling at Washington I do not know. I have not been able to find any decision upon the question.

I also recollect that the street railway companies attempted to add the one cent to their fare, but did not persevere in their attempt a great while.

The defendant raises a constitutional question, and that is, that if the act does require the defendant to pay for the stamp, it imposes a direct tax in contravention of the Constitution of the United States, within the meaning of the income tax decision of the Supreme Court of the United States.

I shall not pass upon that question, as it was not argued before me. At first glance I see nothing in the contention as to the unconstitutionality of the act.

Stamp Acts went into effect, I believe, in England, during the time of William and Mary; they are the recognized method of the means of taxation in all countries.

The Stamp Act was in force for a number of years during the war, and no decision is pointed out which at all intimates that it is unconstitutional.

At first glance I think there is nothing in the contention, but I will not pass upon it directly.

The relator contends that he is entitled to a continuing mandamus, while the defendant contends that the relief must be confined to the single transaction or shipment mentioned in the petition.

This relator is engaged in a business which requires it to send by express about two hundred parcels a day. To require that it shall seek a mandamus as to each shipment would be a travesty upon the administration of justice. Such a rule would leave the weak, that is, the shipper, at the mercy of the strong.

A more reasonable rule, and the rule contended for by the relator, prevails in this state.

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I have not had time to look up the authorities, but I remember the case of Nelson *v.* The Chicago & Alton Railroad Company so decides. See also C. & N. W. Ry. Co, *v.* People, 56 Ill., p. 365, and Vincent *v.* Chi. & Alton, 49 Ill., p. 33.

Let the writ of mandamus issue as to the shipment mentioned in the petition and as to all future shipments tendered by the relator.

OPINION OF JUDGE FRAZER.

THE CIRCUIT COURT FOR THE COUNTY OF WAYNE.

ATTORNEY GENERAL, on the Relation, etc.,
vs.
AMERICAN EXPRESS COMPANY, and CHARLES F. REED.

The petition in this case is filed for the purpose of procuring a mandamus to compel the American Express Company, respondent, to accept goods offered to it by certain shippers for transportation, and to receive and transport the same to their destination, and it is claimed that the express company refused to so transport the same, unless the shipper pay for the revenue stamp, which the law requires to be affixed to the receipt, which the express company is required to give to the shipper. The shipper having declined to do this, this application is for the purpose of requiring the American Express Company to so trans-

port said packages and to affix the required revenue stamp to the receipt.

The first question raised by the respondents is that the circuit court had no jurisdiction over the company, for the reason that the respondent, the American Express Company, is a joint stock association, and the only authority that the circuit court has to issue a mandamus is under Rule 46 of the Supreme Court, that "Circuit Courts shall have jurisdiction, within their respective counties, in all mandamus proceedings, involving the action of any officer or board of any county, township, city or school district, or of the common council of any city or village, and the action of any private corporation or officer or board thereof."

It is contended that under this rule, no power is granted to the Circuit Court to issue writs of mandamus as against such joint stock associations.

I am of the opinion that it was the intention of the Supreme Court to include all joint stock associations under the term private corporation. To hold otherwise would, in my opinion, be to put too narrow a construction upon the rule, for a joint stock association is to all intents and purposes a corporation, and I see no good reason why, under the term corporation, a joint stock association would not be included.

I think that the suit is properly commenced in the name of the Attorney General, although the remedy sought is by private parties.

The main question to be determined is, whether the shipper or express company shall pay for the revenue stamp required by the Act of Congress. The respondent, the American Express Company, being a common carrier, and the question being one of public interest, in which all shippers of goods are interested, and a common carrier being required to receive and transport goods, no matter by

whom offered, if proper rules and regulations made by the carrier are complied with, I see no impropriety in the intervention of the Attorney General in this matter, in the application for this writ.

In my opinion, the jurisdiction of this court, in the premises, cannot be successfully disputed, and the remedy sought can only be applied to the case in hand, and that is, to compel the respondents to receive and transport the goods and furnish a proper receipt in the case now actually before the court. I cannot see how any decision of this court can be made to affect or control any cases that may arise in the future.

It was claimed upon the argument that the petition did not state that the charges were paid, or offered to be paid, upon the packages that were offered for shipment; but this question was abandoned upon the argument, and it was left for the court to decide it the same as if these charges had been tendered; so the question of the tender of these charges to the respondent, the express company, is, by the agreement of counsel, eliminated from the case.

The serious question presented for the consideration of the court in this issue is, whether under the Act of Congress, passed for the purpose of raising revenue, it is the legal duty of the express company to attach to the receipt or bill of lading a revenue stamp such as the law requires.

As I understand, the law applying to this subject is found in Schedule A of the Revenue Law of 1898, and is as follows:

> "Express and Freight: It shall be the duty of every railroad or steamboat company, carrier, express company or corporation, or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted

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> for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding, for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, or bundles, or not so enclosed or included; and there shall be duly attached and canceled, as in this act provided, to each of said bills of lading, manifest, or other memoranda, and to each duplicate thereof, a stamp of the value of one cent."

This is the main portion of the law applying to the question in hand.

It is manifest to me that it was the intention of Congress to require the Express Company to deliver to the person offering for shipment any goods or packages, a receipt for the same, and it requires said receipt to have attached to it a revenue stamp of one cent.

And the same act provides that "Any failure to issue the said bill of lading, manifest or other memorandum as herein provided, shall subject such railroad or steamboat company, carrier, express company, or corporation or person, to a penalty of fifty dollars for each offense, and no such bill of lading, manifest, or other memorandum, shall be used in evidence unless it shall be duly stamped as aforesaid."

From these provisions, it is clear to me that such a receipt would not be valid as evidence in any court of law, or good for any other purpose, were it issued without the said stamp being attached; and if the law requires—as it plainly does—the Express Company to issue this receipt, it requires the issuing of such receipt as shall be good in law, to wit: one with the proper stamp attached.

In the brief furnished me by counsel for respondents, it is claimed that the respondents decided to raise and did

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raise their rates on the shipment of various packages one cent, for the purpose of meeting the changed conditions made by the act of Congress referred to, and they claim that under this right to affix reasonable charges for the transportation of packages, they had a right to increase the amounts one cent for each package for the purpose of meeting the additional expense required by this stamp duty.

It is true, as I look at this question, that the Express Company, the respondent, had a right to determine within reasonable limits, what its charges would be for the transportation of goods through its office or offices; but the right to determine and make reasonable charges for the transportation of goods is, in my opinion, a different thing from the increase of rates which had heretofore been deemed reasonable, for the purpose of avoiding the payment of the tax directed by Congress for raising of revenue for the carrying on of the war. In my opinion, this increase of amount charged for the transportation of packages, is not in any sense for the purpose of meeting any additional expense that the Express Company may be put to for the carrying or transporting of these packages, but was added for the express purpose, as is practically admitted in this case, of transferring the burden of paying a portion of the revenue necessary to carry on the war, from the shoulders of the Express Company to those of its patrons. The raising of the rate of one cent upon each package is, in effect, to impede the operation of the law, and therefore illegal. I do not believe, under any view that may be taken of the law, that any court could properly encourage a corporation or person in thus avoiding a duty which is clearly imposed upon it by the act of Congress. It would be against public policy to allow the just burdens imposed by the law-making power to thus avoid it, and it is clearly apparent to the court that this was the intention

of the respondent. It may be burdensome upon the respondent to have to pay this tax. All taxes are burdensome. But, as it is imposed clearly by the law-making power, it is the duty of the courts, regardless of consequences, to enforce it.

It was said upon the argument that stamps were required to be affixed and put upon articles sold by individuals, such as proprietary medicines and the like, and that the price of the article was increased the amount of the revenue stamp, so as to require the purchaser to pay it. I think the principle in the one case is entirely different from that in the other. In the case of proprietary medicines, a purchaser need not purchase the article unless he sees fit; the seller is not required to sell it; they are private people, dealing with each other, and they can determine between themselves, and must determine between themselves, who must pay the revenue. But a common carrier, whose duty by law it is to transport these articles, is, in the nature, to say the least, of a *quasi* public body, with a duty imposed by law, and that duty cannot be avoided. They must transport the article; the law requires them to do it; and they must comply with all the conditions of the law before the article is so transported by them. The principles in these two cases are different. It is not a parallel case to say that private persons, dealing with each other, are to be judged upon the same legal principles as those involved in this case now before the court.

The writ of mandamus will issue.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 220.

THE AMERICAN EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

FRED A. MAYNARD, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, DEFENDANT IN ERROR.

Supplemental Brief for Defendant in Error.

By C. E. Warner.

There are two points or contentions in the brief of Mr. Ledyard in behalf of the express company to which we desire to advert briefly:

First. It is said that the penalty clause of the express and freight provision of the act indicates an intention to impose the tax "*indifferently* upon the carrier and shipper," as indicated by section 6, and that therefore the act leaves "it a

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matter of negotiation and contract between the parties which of them shall bear the burden of the tax" (p. 15 *et seq.*), and

Second. That the statute employs the *impersonal* expression in every instance in which it speaks of the affixing of the stamp, and that such precision of language cannot be ascribed to chance or accident (p. 20 *et seq.*).

I.

Penalty Clauses.

Regarding the first proposition, we submit that there is no inconsistency in the penalty clauses, but that they are entirely harmonious and are enacted for different purposes and to reach different offenses.

It may be admitted, for the purposes of argument, that the terms of section 6 requiring payment of taxes upon instruments are *indifferent* as between the persons or parties who shall issue an instrument and those for whose use or benefit the same shall be issued.

This section is, of course, *general* in its terms and application, and applies *indifferently* to all classes of persons and all classes of instruments.

In many respects, however, this *indifference* disappears as particular provisions are considered and different "*instruments, matters, and things*" are subjected to the burden of the tax.

Referring to the *penalty* provisions, section 7 provides—

"That if any person shall * * * *issue* or cause to be * * * *issued* any instrument * * * without the same

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being duly stamped * * * or without having thereon an adhesive stamp to denote such tax, such person * * * shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a *fine* of not more than one hundred dollars, at the discretion of the court."

This section is not *indifferent*. It applies to any person who shall *issue* or cause to be *issued* the *instruments* mentioned in Schedule "A."

It imposes a penalty for the *issue* of such instruments irrespective of the *intent* with which it is done.

It is general in its application, and applies to any person who shall issue or cause to be issued the instrument without the stamp, and imposes a *money* penalty only.

Then comes section 13, which deals with the question of *intent*, and provides for *fine* or *imprisonment* or BOTH.

It provides:

"That any person or persons who shall * * * *issue* * * * or who shall cause to be *issued* * * * any instrument * * * mentioned in Schedule A of the act without the same being duly stamped or having thereupon an adhesive stamp for denoting the tax chargeable thereon, * * * *with intent to evade the provisions of the act*, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a *fine* not exceeding fifty dollars, or by *imprisonment* not exceeding six months *or both*, in the discretion of the court."

Intent is essential in this provision, and both *fine* and *imprisonment* may be imposed.

Then comes the "express and freight" clause.

Mr. Ledyard very properly says (p. 9) that the legislature intended to select for taxation *transactions* which were of fre-

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quent occurrence and of such a nature that they are evidenced by documents. He cites cases in which the transactions intended to be taxed "*might take place without the creation or delivery of any document,*" and mentions the "*transaction of carriage*" as one of them. Very true!! And it was to meet this very situation that the penalty clause was inserted in this paragraph.

The purpose was to *create* an *instrument* not theretofore required by law, nor necessary to the *transaction* in question, which might be stamped, and the penalty was therefore directed to the "*failure*" to "*issue*" such instrument.

Section 7, therefore, applies to the issue of such an instrument when "*intent*" is not essential, and imposes a *fine* only.

SEC. 13. When "*intent*" is essential and imposes both *fine* and *imprisonment*, in the discretion of the court, and the penalty in the "express and freight" clause is to the *failure* to *create* and *issue* the instrument at all.

It will therefore be seen, we think, that these different provisions are perfectly consistent and harmonious and furnish no ground for the criticism or contention of counsel for the express company as bearing upon the interpretation contended for by defendant in error.

Counsel, however, unduly *limits* this "express and freight" provision. The purpose, he says, is to "*create and bring into existence a document evidencing the shipment and capable of receiving a stamp.*" That is not the language. It is that the express company shall issue "*to the shipper.*" Not create or issue alone, but "*issue to the shipper,*" and this contemplates a "delivery to the shipper of this instrument" as a *completed legal* instrument—one with the stamp attached,

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as required by the act in question, and the penalties are directed against the failure to *issue* and the failure to stamp, with an additional penalty, if the failure to stamp is with intent to evade the act.

It is further said (p. 13) that section 6 contains the only words by which a stamp tax is imposed or by which any duty to pay is imposed upon any one.

Not so. The "express and freight" provisions, as applicable to carriers, is complete in itself. It stands alone. It imposes a duty just as certainly and effectually as section 6. Mark the language:

"It shall be the duty of every * * * express company * * * to issue to the shipper * * * a bill of lading * * * and there shall be duly attached and canceled as in this act provided * * * a stamp of the value of one cent."

Section 7 provides for attaching the stamp and section 9 for its cancellation, and this provision is therefore complete *without* section 6. Therefore we have in this provision alone the duty to *issue*, the duty to *stamp*, and the duty to cancel. Apply to it the penalty provisions of sections 7 and 13, and we have the act complete in itself, with penalties for its violation, without resort to section 6 at all.

As we have stated in our principal brief, when we have the *duty* enjoined upon the company to issue "*to the shipper*" the receipt and a penalty for failure to issue the same, and a further penalty under section 7 for a failure to stamp, expressly directed to the *person* who *shall issue* the instrument, and a still further penalty under section 13 for a failure to stamp "*with intent to evade the provisions of the act*," and this,

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again, expressly directed to "*the person* who shall issue or *cause to be issued*" said instrument, it would seem to logically follow that the person or company who or which was directed to issue the instrument was the one who was expected to pay the tax.

It would hardly be supposed that Congress intended to punish the person who *issued* an instrument by fine and imprisonment for the failure of the one "*for whose use or benefit it was issued*" to attach and cancel the stamp. This would be exceedingly illogical.

II.

IMPERSONAL PROVISIONS.

In reference to the so-called *impersonal* provisions of the act, counsel is again in error.

The act is not *impersonal* when it refers to the great corporations exercising public functions, like railroads, sleeping-car companies, express companies, steamboat companies, carriers, telephone companies, and telegraph companies.

Section 18 applies to *telegraph companies*, and it may be fairly argued that the duties of those companies are not clearly defined. They are, however, common carriers, and it is probable that they could not decline to transmit a message if the usual fees were tendered by the sender without the stamp. The duties of all the other companies, however, are certain and fixed, and the "*impersonal expression*" cannot be said to be used in regard to them.

Railroad companies, steamboat companies, carriers, and express companies are controlled by the "express and

freight" clause of the act, and we submit that their duty, under a fair reading of this clause, is manifest and clear. It is their duty to issue and deliver to the shipper the receipt, and their duty is not performed till they attach the stamp.

Telephone companies are covered by the act under the head of "*telephone messages.*" It is made the duty of "every person, firm, or corporation owning or operating any telephone line or lines" to make a sworn statement within the first fifteen days of the month, stating the number of messages transmitted during the preceeding month for which a charge of fifteen cents or more was imposed, "*and for each of said messages * * * the said person, firm, or corporation shall pay a tax of one cent.*"

Nothing impersonal about this.

And so with sleeping car companies section 28 provides for a tax of one cent for every seat sold in a palace or parlor car and on every berth sold in a sleeping car, "the stamp to be affixed to the ticket *and paid by the company issuing the same.*"

Passage tickets upon vessels to a foreign port are subject to taxation. They may be said to be impersonal, yet we understand it to be the rule of steamboat companies, precisely as railroads, to pay the taxes imposed by the act without question.

Counsel has selected for his illustration (p. 13) cases which are necessarily *impersonal* in character, like leases, mortgages, drafts, sales, powers of attorney, custom-house entries, &c.: but as a matter of every-day practical construction, so far as our observation extends, the stamp is in

every instance paid by the maker of the instrument—a lease by the lessor, mortgage by the mortgagor, drafts and checks by the drawers and makers, and so on indefinitely.

It may be entirely true that as between the parties to an agreement entirely voluntary in character, that Congress did not undertake to say, as between party and party, which should pay the tax. That may have been left to the agreement of the parties. Not so, however, as to these great public corporations in the exercise of public functions, possessing common-law obligations independently of strict contract. They carry on a business "affected with a public interest," possessing franchises and doing business in the several States, as in Michigan, only by permission and license. As so well said by Mr. Commissioner Atkinson, "*it was necessary to bring under the taxing power all the resources of all the people * * * and that it is not conceivable that the Federal Congress should have selected great transportation companies of the country as the sole object of special legislative benefaction, and, taxing all others, exempt them alone from the operation of the law.*"

They derive great support and protection from the law, and it is only right that they should bear their share of the burden imposed upon all the people for the purpose of defraying the expenses of the military and naval forces engaged in the war with Spain.

III.

Counsel further argues (p. 24 *et seq.*) that when the companies found themselves confronted with the tax upon bills of lading, they found that if they assumed the burden them-

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selves they would be subjected to taxation infinitely greater than that laid upon any other class of the community, and they therefore argue that they had a right to shift the obligation upon the shippers by adding the amount of the tax to the rates before prevailing.

This would seem to be a poor reason for avoiding the obligation which the law had imposed upon the companies. In the language of the day, "*there are others*" who already have their own burdens imposed upon them by the law, and there would be no measure of justice in allowing them to escape all obligations to the Government which fosters and protects them, by shifting the burdens upon other shoulders.

Counsel argues that the obligations of the law are *indifferent* and *impersonal* as between shipper and carrier. If the company can decline to "carry" unless the shipper shall pay the tax, then it can with much greater reason, as regards all those *impersonal* matters which counsel refers to upon page 24 of his brief, like drawing checks, selling securities, issuing certificates of stock, &c., decline to do so unless the party "*for whose use or benefit*" they are made, drawn, or issued, shall pay the tax, and thus avoid all obligations for this common burden.

The burdensome character of the tax may be a good argument to address to the law-making power, but not to the court. It is precisely the complaint which the companies made under the acts of Congress of 1862, 1863, and 1864. As we have seen, the obligation was imposed under those acts almost precisely identical in terms with the present act, except as to amount. The companies did not then pretend that the tax was not imposed upon them, or that they had

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a right to shift the tax to other shoulders, but, on the other hand, practically admitted the obligation, and went to Congress for relief. Congress did relieve them by changing the the law from a specific tax on packages to a gross tax on receipts.

If the tax, therefore, is unduly burdensome, let the companies go to Congress, where there is authority to relieve them, and not attempt to shift the responsibility for their share of the public burden imposed by the war with Spain, to the shoulders of others who are bearing their own share of the burdens without murmur or complaint.

IV.

Counsel further says (p. 27) that the plaintiff in error is not a corporation, but an unincorporated association, purely the creation of private contract and without any privileges, franchises, or duties save such as are enjoyed by individuals pursuing the same business.

Not so again. By paragraph 7 of respondent's answer (Rec., p. 11) the company alleges—

"That respondent, regularly organized and existing under and by virtue of the laws of New York, and acting under regularly issued license of this State, by its organization and compliance with the laws of this State (Michigan), as admitted in paragraph 5 of said petition to have been done, *became vested with the right to exist in a corporate capacity* and to regulate the carrying on of its business by reasonable rules and regulations," &c.

This answer embodies the exact situation and completely refutes the contention of counsel.

We have discussed in our principal brief (p. 50 *et seq.*) the similarity between corporations and joint stock associations, which it is not necessary to repeat. For all practical purposes, they are the same, and it was so held by the supreme court of Michigan.

V.

We insist, therefore:

1. That the obligation to provide the stamp is upon the company and not upon the shipper.

2. That the company has no right to shift this burden to the shoulders of shippers by adding the tax to the rates theretofore prevailing.

3. That such acts are not regulations of rates, but merely an attempt to avoid and evade its own responsibility for the tax under the law.

4. That the judgment of the supreme court of Michigan should be affirmed.

C. E. WARNER,
Of Counsel for Defendant in Error.

No. 220.

Sup't. Brf. of Warner for D. E.

NOV 7 1899
JAMES H. McKENNEY,

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Nov. 7, 1899.

No. 220.

THE AMERICAN EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

FRED A. MAYNARD, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, DEFENDANT IN ERROR.

We submit herewith a summary of the opinion of the Attorney General rendered August 26, 1898, upon a question as to the obligation of the United States Express Company to stamp receipts, bills of lading, &c., issued by it to the Government in cases where such company was engaged in transporting moneys and securities under contract with the Government.

TREASURY DECISION No. 19996.

The Secretary of the Treasury submitted for the decision of the Attorney General the question whether under the war-revenue act, the United States Express Company was required, when receiving money or securities for transpor-

tation for the Government under a contract for carriage between it and the Government, to issue to the consignor a bill of lading, manifest, or other receipt, with a one-cent stamp duly attached and canceled.

Under this contract the express company was employed exclusively by the United States as its transportation agent for the transportation of all moneys and securities belonging to the United States within certain territorial limits, and the contract fixed the rate of compensation.

It was contended by counsel for the express company that moneys and securities transported by it under this contract were exempt from the provisions of the act in question for the reason, among others:

2d. That in view of the fact that the amount of its compensation for carrying each shipment had been determined and agreed upon in advance, the imposition of a stamp tax upon each shipment was in effect a reduction of the compensation reserved to the company, and an impairment to that extent of the obligation of the contract, and an arbitrary and oppressive act under the guise of taxation.

The Attorney General considered this contention and held that receipts, bills of lading, or manifests issued by express companies under this contract were subject to stamp tax under the act of 1898.

The opinion may be summarized as follows:

a. That the imposition of the stamp tax neither impaired the obligation of the contract nor took private property for public use without compensation or without due process of law.

b. That while the imposition by way of stamp duty is commonly called a tax, nevertheless, considered in the light of the constitutional provision which regulates the levy of such taxes, it is not strictly a *tax*, but an *impost*, and that all duties, *imposts*, and excises must be uniform.

c. That the constitutional requirement of uniformity pertains to this particular piece of legislation, inasmuch as it is uniform upon all subjects of the same kind and class and "extends to all cases where goods are received for transportation by express companies, no matter whether the consignor be a municipality, a State, or the Federal Government itself, and without regard to whether such goods are received and transported under a continuing contract previously entered into or *under the ordinary obligation of a common carrier to take and transport the goods of all who apply and tender reasonable compensation.*"

d. That no difference is perceived in the effect of this law in its operation upon the express company, whether it transports goods for the Government under this contract and those instances where this or other companies are under similar contract with private persons at fixed rates established prior to the passage of the act and continuing during its operation.

e. That it would terminate the power of the Government to levy taxes and imposts if individuals were allowed to set up the plea that thereby their contracts were rendered less profitable than before, or even that their profits were more than balanced by the governmental exactions. "The payment of taxes in any form is not supposed to contribute to the profits of the subject, but to swell the funds of the Government. Taxes may be ruinous, but they, for that reason, are not unlawful. The power to tax is the power to destroy" (Marshall, Ch. J., McCulloch *vs.* Maryland, 4 Wheat., 431).

f. That the impost is not peculiar to this company nor to its business. It is general, uniform, and has no exceptions. It applies to all cases where previous contracts exist between the company and its shippers. It does not assume to nor does it in fact violate or impair a single condition of the contract.

g. That "*the act merely imposes upon the company a duty as to the issue of the receipt and the cancellation of the stamp, which are the methods for securing the payment of the impost intended to be laid for the high purpose of sustaining the Government in time of war.*"

h. That so long as the contractor is taxed uniformly with all others in the same line of business, upon the same transaction, and the tax is levied for appropriate objects of taxation, he cannot complain merely because his compensation or profits under his contract with the Government are thereby indirectly reduced. The contract is not affected. The *business of the contractor* is taxed, and it is not material whether the business is with private persons or with the taxing government itself.

i. That the express company is not exempt from the requirements of the war-revenue act in the transportation of money, securities, &c., for the Government.

MEMORANDUM.—It will be noted that the express company did not at this time contend, as in the case at bar, that the law was *impersonal* as between the company and the shipper, nor that it should be relieved because it was the duty of the Government "*for whose use or benefit*" the *instrument* (receipt) was to be issued under section 6, to pay the tax.

If it is the duty of the private shipper to pay the tax as between the express company and the shipper, then it was equally the duty of the Government, and the company should have been relieved on that ground. This obviously was not the attitude of the Attorney General, nor was it the contention of the company in that matter.

C. E. WARNER,
Of Counsel for Defendant in Error.

No. 220.

Office Supreme Court U. S.
FILED
NOV 15 1899
JAMES H. McKENNEY,
Clerk.

No. 220.

PAYMENT

OF

WAR STAMP TAX

BY

Express and Telegraph Companies.

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OPINIONS OF

COMMISSIONER ATKINSON

AND ORDERS OF

THE RAILROAD COMMISSION OF GEORGIA.

PAYMENT

OF

WAR STAMP TAX

BY

Express and Telegraph Companies.

In Re RULE REQUIRING THE SOUTHERN EXPRESS COMPANY TO SHOW CAUSE WHY SUITS SHOULD NOT BE INSTITUTED AGAINST IT FOR RECOVERY OF PENALTIES FOR DEMANDING AS A CONDITION PRECEDENT TO RECEIVING EXPRESS PACKAGES FOR SHIPMENT THAT SHIPPERS FURNISH REVENUE STAMPS REQUIRED TO BE AFFIXED TO BILLS OF LADING, ETC.,

AND

In Re COMPLAINT AGAINST THE WESTERN UNION TELEGRAPH COMPANY FOR OVERCHARGE IN DEMANDING OF THE SENDERS OF TELEGRAPHIC DISPATCHES THAT THEY ATTACH AND CANCEL THE REQUISITE REVENUE STAMPS BEFORE RECEIVING THE SAME FOR TRANSMISSION.

OPINIONS OF

COMMISSIONER ATKINSON

AND ORDERS OF

THE RAILROAD COMMISSION OF GEORGIA.

ATLANTA, GA.
THE FRANKLIN PRINTING AND PUBLISHING CO.
Geo. W. Harrison, State Printer, Manager.
1898.

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OFFICE OF
THE RAILROAD COMMISSION OF GEORGIA.
ATLANTA, GA., August 2, 1898.

IN RE RULE REQUIRING THE SOUTHERN EXPRESS COMPANY TO SHOW CAUSE WHY SUITS SHOULD NOT BE INSTITUTED AGAINST IT FOR RECOVERY OF PENALTIES FOR DEMANDING AS A CONDITION PRECEDENT TO RECEIVING EXPRESS PACKAGES FOR SHIPMENT THAT SHIPPERS FURNISH REVENUE STAMPS REQUIRED TO BE AFFIXED TO BILLS OF LADING, ETC.

OPINION OF COMMISSIONER ATKINSON.

It having been brought to the attention of this Commission that since the passage by the Federal Congress of an Act entitled: "An Act to provide ways and means to meet war expenditures, and for other purposes," that the Southern Express Company, a corporation engaged as a common carrier in the transportation of goods between points within this State, demands, as a condition precedent to *forwarding* goods tendered to it for shipment, that the consignor shall deliver to it the necessary revenue stamp to be affixed to the bill of lading required to be issued by such company, and complaint being made that the effect of the refusal to transport and deliver such goods, except upon compliance with such demands, was a violation of those provisions of the law in this State limiting the rates of freight chargeable by express companies to the rates prescribed by this Commission, an order was issued, calling upon the Southern Express Company to show cause why suits

should not be instituted against it for the recovery of the penalties prescribed by law for the exaction from shippers of a sum in addition to and in excess of rates prescribed by the Commission. In response to the rule thus issued, the express company, by its counsel, appeared and answered in effect, that this Commission had no jurisdiction to inquire and determine of and concerning the several matters and things set forth in said rule. Further, it denied that it had in any manner increased its charges for *forwarding* goods, or made any demand upon any person for any sum in excess of the rate fixed by this Commission. Further, it admitted that it had declined to receive goods for shipment unless the tax laid by the revenue act in question was tendered with the goods intended to be consigned, but denied that this Commission had any authority to inquire or act concerning any refusal by it to receive goods for transportation.

While under section 2196 of the Code of this State this Commission has full power, without notice, to institute suits for the penalty named in said section, "whenever, in their opinion, the circumstances authorize it," yet, in view of the great public interest involved, and in view of the many penalties which may have been incurred under a misapprehension of the true intent of the law, and in view of the volume of litigation which would necessarily result, if in each individual case a separate suit was instituted, the Commission caused the parties interested to be summoned before it, to the end that, before taking action in regard to the subject, it might be informed as to the respective rights of the consignor and carrier, and thus be able to determine whether in its refusal to accept for shipment and to *forward* goods tendered to it for transportation, without tender likewise of the necessary revenue stamps, the carrier was indeed

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acting in violation of the law, and whether, if so, the violation was of such a character as in the first instance to justify the application of the drastic remedies afforded by suits for penalties which may have been incurred.

This matter having been referred to me for examination, I herewith submit the conclusions reached, and, as well, a statement of the considerations which have induced that conclusion:

According to my conception of the issues made, two questions are presented for consideration, upon the proper solution of which will depend the correctness of the conclusion reached. The first of these is: Does the act of the Federal Congress in question impose upon the express company the duty of furnishing the requisite revenue stamps to be affixed to the bill of lading required in the case of each consignment to be issued by the carrier? Second: If so, is the refusal to accept and forward such goods, except upon the conditions that the shipper shall bear the burden of the carrier to the extent of providing such stamp in addition to the payment of the regular rate prescribed by this Commission for the transportation of such goods, a violation of the law which prohibits carriers from exacting a rate of transportation in excess of the maximum rate so prescribed?

We will proceed to consider the questions proposed in the order in which they are above stated; and first, as to the duties imposed by the statute upon the respective parties. Duties may in the abstract be classified, as imposed and assumed. The former may be properly said to embrace and require the performance of that class of acts which are enjoined upon one by a mandate of some superior power which exercises a controlling influence over the will of him who is required to perform such acts. The mandate issued by such an authority operates

upon the subject whether he be willing or unwilling; and among this class of duties is included the performance of those acts enjoined by law, and which the subject is not at liberty to omit. Assumed duties are such as result from contract relations, respecting which each individual is primarily a free agent, and which can only arise in consequence of his having of his own volition entered into an agreement by the terms of which he has become bound to the performance of a given act. Duties, whether imposed or assumed, admit of another classification equally general. They may in either case be express or implied. The former includes all of those acts which have been expressly enjoined upon the subject by the mandate of a superior power; and as well, such as by the terms of his engagement he has directly pledged himself to perform. Without reference to the sources from which such duties may arise, they are equally binding upon the subject, though the methods of enforcing their performance may widely differ. Duties may be said to be implied where the acts to which they relate are neither expressly enjoined by the superior nor expressly assumed under the contract, but which are yet of such a character as that the performance of the act enjoined or assumed necessarily involves and includes the performance of some other incidental act respecting which both the mandate of the superior and terms of the engagement are silent. In such a case the law imposes as against the person bound to perform the particular act the duty likewise to perform such incidental acts as may be necessarily involved.

These distinctions are stated in order that we may more readily arrive at the true meaning and intent of the Federal Congress as that intent is manifested by the provisions of the law in question. Referring to the act under consideration, we find no express provision imposing directly upon the carrier the duty of furnish-

ing the revenue stamps required by the statute to be affixed to its bills of lading; and yet, upon a careful consideration of its various provisions it is difficult to resist the conclusion that such was the intention of the Congress. Section 7 of the revenue act referred to provides:

"SEC. 7. That if any person or persons shall make, sign or issue, or cause to be made, signed or issued, any instrument, document or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document or paper, as aforesaid, shall not be competent evidence in any court."

Section 6 of the act describes the classes of papers and documents to which the penal provisions of section 7 are made to apply, and refers for a more complete description to what is designated as Section A, this schedule enumerating in particular the documents generally described in sections 6 and 7. Under the heads of "Express and Freight" (Schedule A), we find the following provision:

"It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation, or person whose occupation it is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached, as in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: *Provided*, That but one bill of lading shall be required on bundles

or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest or other memorandum herein provided, shall subject such railroad or steamboat company, carrier, express company or corporation or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest or other memorandum shall be used as evidence unless it shall be duly stamped as aforesaid."

It will be seen from these provisions that section 7 prohibits under a named penalty the issue of any paper or document without "same being duly stamped for denoting the tax hereby (meaning by this act) imposed thereon." It will be further seen that the act imposes upon the carrier the express duty of issuing in every instance a bill of lading covering each consignment. Since, therefore, this duty is imposed and the omission to perform it rendered penal, it necessarily follows that the person expressly charged with the duty to issue the bill of lading is also impressed with the implied duty of providing the agencies and instrumentalities necessarily incidental to the performance of the duty expressly enjoined. Since he is bound to issue a bill of lading and cannot issue it without its being first stamped, the duty of stamping is necessarily incidental to and consequently included in the duty to issue. We will test this view from another point of observation: The paper upon which the bill of lading is to be written is indispensable to the execution of such an instrument. Suppose in the absence of the statute the parties had entered into a contract of affreightment under which, upon a given consideration, the carrier assumed to transport the goods of consignor to a given point, what court would for an instant consider the proposition that the consignor, in addition to the rates prescribed by the contract, should be

charged with the duty of preparing the bills of lading? The duty of preparing the bill of lading is one springing out of the contract, and devolves necessarily upon the carrier unless the consignor varies the general rule and expressly assumes that burden.

Since the law imposes upon the carrier the duty of furnishing to the shipper a bill of lading, nothing short of a complete bill of lading, evidencing a completed contract of affreightment, will suffice; for unless it comes up to that standard it is not a bill of lading in contemplation of the statute, and since the affixing of the stamp, according to the very terms of the act, is indispensable to the evidence of a contract of affreightment, it follows that this is one of the incidental acts which is to be performed by the carrier; and since the law enjoins upon it the duty to affix the stamp (there being no express requirement that it shall be furnished by the consignor), the necessary and irresistible implication is that it shall be furnished by the person bound to affix it.

In the course of argument in this case it was urged that inasmuch as the statute did not expressly designate the person who should bear the cost of furnishing the requisite stamps, its silence respecting that subject was to be accepted as evidence of indifference upon the part of the Congress as to the person upon whom this duty devolved; and, as further emphasizing this idea it was pointed out that there were two penalties imposed by the Act; one against the carrier, pecuniary in its nature; the other against the consignor, which rendered an unstamped bill of lading inadmissible as evidence. I do not find in this circumstance any evidence of a legislative intent either to excuse the carrier from the duty of affixing and furnishing the requisite stamp or of an intent to leave the matter in such a state as to enable the carrier to impose this duty upon the shipper. On the

contrary, it would seem that the infliction of the penalty upon the consignor was rather designed as an additional safeguard against loss of revenue to the Government by making it to the interest of the shipper to see to it that the carrier in the first instance furnished to him such an evidence of the contract of affreightment as would be available to him in case his rights under such contract should ever be called in question. And since this could only be accomplished by stamping the instrument as required by law, the consignor was given a direct concern in seeing to it that the carrier had performed its duty of affixing and cancelling the stamp before accepting the bill of lading. If it had been the intention of the Federal Congress to require of the carrier no more than the delivery to the consignor of the unstamped bill of lading, then the penalty for failure to stamp and cancel the same would most naturally have been directed against the person who had in accepting the bill of lading subsequently failed to stamp it. If the penal act consisted in the failure to stamp a bill of lading subsequent to its issue, there might be some reason in holding that the consignor accepting such a bill of lading would be the person whose duty it was to stamp it; but since the penal act consists in the issue of an unstamped bill of lading, it necessarily follows that the one issuing the bill of lading must stamp it in order to avoid the penalty. If it had been the purpose of the Federal Congress to impose this burden upon the shipper, the most natural course would have been to require that an article presented for shipment should itself bear a cancelled stamp. Had this been done the duty would have been upon the shipper; because until a stamp was affixed the carrier would have been under no duty to receive the goods for shipment. But since on the other hand the Congress has seen proper to require a stamp to be affixed to the bill of lading,

which must itself originate with the carrier and be issued by him, the conclusion is inevitable that it was the purpose of the law to charge the carrier with the cost.

Aside from these considerations, when we take the broader view and consider the circumstances under which and purposes for which this bill was passed; when we consider that the country was just engaging in a conflict with a great and powerful nation; that in consequence it was necessary to raise by taxation enormous sums of money to maintain the national military and naval forces and equipment and that, in order to raise this money, it was necessary to bring under the taxing power all the resources of all the people; that every industry and every person, even in the most trivial domestic and business concerns are required by the system of stamp taxation devised to contribute to this common fund; that it is so far-reaching in its effects that none could escape the exactions of the tax-gatherer, it is not conceivable that the Federal Congress should have selected great transportation companies of the country as the sole object of special legislative benefaction and, taxing all others, exempt them alone from the operation of the law. If it be ultimately held that the carrier is not liable for this tax he is excused from all contribution to the general fund; for while other corporations are taxed upon special transactions and upon gross and net receipts, these corporations are exempted from that class of taxes and throughout the whole scheme of this elaborate piece of legislation there is no provision which by any possibility can be so extended as to impose upon the carrying companies of the country any portion of the common burden. It is submitted that to attribute to the Congress such a purpose would be to deny to it credit for either patriotism or a proper sense of justice. The better conclusion is that when the Congress required carriers to issue a bill of

lading to every shipper its purpose was to require the issue of such evidence of contract of affreightment as would enable the shipper to enforce the duty of carriers; and since affixing the stamp was necessary to the completion of such a bill of lading, the duty was by necessary implication imposed upon the carrier of furnishing and cancelling it.

We come now to consider whether or not the exaction of the cost of a revenue stamp from the shipper amounts to an "extortion," within the meaning of that term as employed in section 2187 of the Code. That Section provides as follows:

"If any railroad corporation organized or doing business in this State under any act of incorporation or general law of this State now in force, or which may hereafter be enacted, or any railroad corporation organized or which may hereafter be organized under the laws of any other State, and doing business in this State, shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track, or any of its branches thereof, or upon any railroad within this State which it has the right, license or permission to use, operate or control, the same shall be guilty of extortion, and, upon conviction thereof, shall be dealt with as hereinafter provided."

By the terms of the act creating this commission, power was conferred upon the Railroad Commission of Georgia relatively to intra-state business, in general and comprehensive terms, "to make reasonable and just rates." Section 2189 of the Code makes it the duty of and empowers the commission "to make reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business in this State on the railroads thereof; shall make reasonable and just rules and regulations to be observed by all railroad companies doing business in this State as to the charges at any and all points for the necessary handling and delivery of freights; shall make such just and reasonable rules and regulations as may be necessary for preventing

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unjust discriminations in the transportion of freight and passengers on the railroads in this State," and other powers and duties not necessary here to enumerate. It was required to make and publish a "schedule of just and reasonable rates of charges for the transportation of passengers and freights and cars on each of said railroads. (See Code, section 3190.) By section 2187 it was made unlawful for a railroad company to charge other than such rates; and by section 2196 appropriate penalties are provided for violations of these sections. By an act subsequently passed (which is incorporated in section 2217 of the Code of this State), express companies, to the same extent as railroads, were placed under the control of the Commission; and it was provided in the last-named act that this Commission "shall have full power to regulate the prices to be charged by any company or persons owning, controlling or operating any such line or lines for any service performed by any such company or person," and the penalties prescribed against railroads for violations of the rules and regulations of the Commission were made applicable to express companies. In the exercise of these powers the Commission has prescribed maximum rates for express service, and has fixed the "prices" to be charged by express companies for the services required to be performed by them in and about the handling of express matter. As necessarily incidental to the duty of transportation which the law of this State imposes upon all carriers, there is the duty to receive and deliver goods tendered for shipment, in accordance with the directions of the consignor. Relatively to the process of conducting their business as such, carriers may make such rules and regulations as may be necessary to their protection; but they cannot under the guise of regulation by any method, directly or indirectly, increase to the shipper beyond the rates fixed by the

Commission the "price" of any service which it undertakes to perform, or impose upon him duties and burdens which are by law imposed upon it.

Under an ordinary contract of affreightment, entered into independently of any law fixing the rates to be charged, the carrier is not authorized to add to the price of agreed compensation any expense incidentally incurred by it in the execution of the contract of affreightment. This principle is well stated in a decision of the Supreme Court of the United States, in the case of Covington Stock Yards Co. *v.* Keith. (Vol. 139 Decisions of Supreme Court, U. S., p. 135.) It there lays down the rule to be: "A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver such stock than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars."

Such being the rule, relatively to contracts in which the price of the service is fixed by agreement between the parties, the same principle would apply with equal force where the rate is prescribed by positive law. To say that a carrier could increase the prescribed rate by the exaction of a sum in addition thereto to cover an incidental expense incurred by it in the execution of its duty to transport would be to admit that, by indirection, it could lawfully accomplish the same end which by the terms of the statute it is prohibited from doing directly.

If, therefore, an express company, under the guise of a charge for receiving goods for shipment, could exact the payment in advance of the revenue tax which devolves upon it, it could as well demand for the same reason any other sum. If they may exact one cent for receiving goods, they may as well exact one hundred cents, and thus directly increase the cost of the service required by law to be performed by it far beyond that prescribed by the rates fixed by this Commission. The service required by law to be performed by the carrier, as we have seen, includes the receipt, transmission and delivery of goods offered for shipment. By the express terms of the statute this Commission is authorized to fix in advance the "price" of that service. It cannot demand from the shipper any sum for that service beyond the rate prescribed; and an effort to subdivide the service so as to enable it to make a charge beyond the prescribed rate is necessarily merely colorable, and is such a scheme or device to evade the law as ought not to be accepted as an excuse for its refusal to conform to the regulations of this Commission fixing rates. While it is true that under its right to make reasonable rules and regulations, compliance with which may be required as a condition precedent to the reception of goods for shipment, it has no right by these means to impose upon the shipper the burdens which otherwise under the law would rest upon it.

I am thus led to the conclusion that in refusing to accept for shipment goods tendered to it without the prepayment by the shipper of the revenue tax required by it to be affixed to its bill of lading, it violates the provisions of the Act hereinbefore referred to, and incurs the penalties which are therein prescribed.

Respectfully submitted,

SPENCER R. ATKINSON,
Commissioner.

OFFICE OF
THE RAILROAD COMMISSION OF GEORGIA.
ATLANTA, GA., August 2, 1898.

IN RE COMPLAINT AGAINST THE SOUTHERN EXPRESS COMPANY FOR OVERCHARGE IN DEMANDING THAT SHIPPERS FURNISH REVENUE STAMPS TO AFFIX TO BILLS OF LADING OR RECEIPTS

On motion of Commissioner Crenshaw it is ordered: That the report and opinion this day filed by Commissioner Atkinson, to whom the above entitled matter was referred, be, and the same is, hereby adopted as the opinion and judgment of this Commission:

And it is further ordered: That unless within five days from this date this Commission is advised by the Southern Express Company that it has discontinued the practice of exacting from shippers the duty of furnishing the requisite revenue stamps to be attached to bills of lading or receipts as a condition precedent to receiving and forwarding goods tendered for shipment, that this Commission will take such legal steps as may be necessary to enforce compliance with its rules and regulations.

By order of the Board:

J. D. MASSEY,
Secretary.

L. N. TRAMMELL,
Chairman.

OFFICE OF
THE RAILROAD COMMISSION OF GEORGIA.
ATLANTA, GA., August 2, 1898.

IN RE RULE REQUIRING THE WESTERN UNION TELEGRAPH COMPANY TO SHOW CAUSE WHY SUITS SHOULD NOT BE INSTITUTED FOR RECOVERY OF PENALTIES FOR DEMANDING AS A CONDITION PRECEDENT TO RECEIVING TELEGRAPHIC DISPATCHES FOR TRANSMISSION THAT REVENUE STAMPS REQUIRED TO BE AFFIXED THERETO SHALL BE FURNISHED, AFFIXED AND CANCELLED BY THE SENDERS THEREOF, ETC.

OPINION OF COMMISSIONER ATKINSON.

It having been represented to the Railroad Commission of Georgia that the Western Union Telegraph Company, a corporation engaged in this State in the business of transmitting telegraphic dispatches for hire, since the passage by the Federal Congress of an Act approved June 13, 1898, entitled: "An Act to provide ways and means for meeting war expenditures and for other purposes," has exacted and continues to exact from senders of telegraphic dispatches, as a condition precedent to forwarding messages tendered to it for transmission between points within this State, the payment of the special tax imposed upon such messages by said Act; and complaint being made that the telegraph company by these means indirectly increases the cost of transmission of such dispatches beyond the rates fixed therefor by this Commission, an order was made calling upon it to show cause why suits should not be instituted against it for penalties incurred in consequence of such demand.

In response to this order the telegraph company, by its counsel, appeared and among other things answered in effect: that the sender of messages was, under the terms of the Act imposing the tax, primarily responsible for the tax, and that the duty was imposed upon him to affix to each message offered for transmission, stamps, showing that the tax had been paid.

This matter having been referred to me, I herewith submit for your consideration the conclusions which I have reached:

A telegraph company, under the laws of this State, is bound to transmit all legal messages tendered to it by any person, upon compliance with such reasonable regulations as it may lawfully make for its own protection. It will be necessary to consider only one of the questions presented in this case, and that is: Can a telegraph company lawfully decline to receive a message for transmission, to which the requisite revenue stamp has not been affixed and cancelled? The provisions of the law bearing upon this question are to be found in Sections 6, 7 and 18, and in Schedule A of that Act. Section 6 provides for a levy of a direct tax upon certain classes of written instruments and refers to schedule A for a more particular description of the instruments upon which the tax is levied. Section 7 of the act makes it penal for "any person to make, sign or issue any instrument" described in schedule A without the same being duly stamped with a stamp denoting the tax thereon. And in schedule A we find telegraphic dispatches specified as one of this species of instruments taxed. Since the Act in terms makes it penal for any person "to make, sign or issue" a telegraphic dispatch without first affixing thereto and cancelling the requisite stamp, it necessarily follows that the telegraph company is under no duty to accept for transmission any message until the

same has been thus stamped; and since there is no duty on the telegraph company to receive it for transmission without its first having been stamped, the burden of so preparing his message as to entitle him to have it transmitted necessarily falls upon the sender. This of course includes the furnishing, affixing and cancellation of the stamp by him before it is tendered for transmission.

Whatever of complication or doubt may have arisen in regard to this matter results from the language of section 18 of the Act. That section provides as follows:

"SECTION 1. That on and after the first day of July, eighteen hundred and ninety-eight, no telegraph company or its agent or employee shall *transmit* to any person any dispatch or message without an adhesive stamp, denoting the tax imposed by this Act, being affixed to a *copy* thereof, or having the same stamped thereon, and in default thereof shall incur a penalty," etc.

We do not think that this section relieves the sender of the duty of stamping the original message. The writing containing the message does not become a lawful dispatch or message until the revenue stamp has been affixed and cancelled; for without that it would have been issued against the prohibitions of the statute, and the law enforces no obligations and recognizes no duties springing out of an illegal act. When this is done, however, the general law imposes upon the company the duty of transmission. But further, section 18 of the Act provides that "no telegraph company shall *transmit* to any person any dispatch or message" without a stamp denoting the tax imposed thereon by the Act being affixed to a *copy* thereof, or having the same stamped thereon. This section is not intended to relieve sender, but only to impose upon the telegraph company a tax of one cent upon each message transmitted by it. Section 6 is directed against the

sender and commands him under a penalty not to issue (in other words tender) a message for transmission until it is stamped. Section 18 is directed against the telegraph company and commands it not to transmit a message to the addressee until a stamp has been affixed to a copy. The stamped original having been delivered to it for transmission, it is under a duty relatively to the sender to transmit; but after this duty arises, it is not at liberty to transmit until it has likewise caused a stamp to be affixed to a copy of such original. When once the sender has complied with the duty imposed upon him of stamping the original, he by that act raises as against the company the duty of transmission; and since this duty cannot be lawfully performed without affixing a stamp to a copy, the law imposes upon the company the duty of performing this incidental act. The copy referred to evidently means the paper delivered to the addressee, for the act of transmission commences when the message is forwarded over the wire and ends when it is delivered to the addressee. It is the completed act of transmission, and not the mere preparation to transmit, which the law pronounces penal; and therefore, since every act in the process of transmission, except delivery, may be lawfully done without the company affixing the stamp, the natural inference is that the stamp should be affixed by the company to the copy of the original presented by the sender, which is delivered to the addressee. On the other hand, if we construe the word "transmit," as referring to the performance of the act first required of the company in the process of forwarding the message, the copy referred to in the act must be stamped before the act can be performed; so that, whatever construction may be placed upon the word "transmit," it is apparent that it was the purpose of the Congress to require the company to stamp a copy.

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If, as according to the plain letter of section 7 of the act, it is the duty of the sender to stamp the original, it would have been idle to require a stamp to be placed upon the copy as provided by section 18, unless it was the purpose of the Congress to lay a tax both upon the sender and upon the person whose duty it was to transmit. This would seem to be the most natural construction of the Act, because by none other is it possible to force the telegraph company to contribute any sum whatever to the general fund; and it is not to be believed that the Congress, taxing all other institutions and occupations, should have specially exempted telegraph companies from the operation of this broad and comprehensive system of raising revenue. Inasmuch, however, as the telegraph companies, by requiring all messages offered for transmission to be stamped, demand of the sender no more than the law imposes upon him, it cannot be said that they have in any manner made an illegal exaction of him. If the companies transmit messages without likewise affixing the requisite stamps to copies thereof, such action upon their part cannot be said to be prejudicial to the sender or in violation of the rules of this Commission. It may give rise to a question between them and the Federal Government, involving the public revenues, but as it does not affect the rates prescribed by this Commission, it is a matter with which the Commission has no concern.

Respectfully submitted,

SPENCER R. ATKINSON,
Commissioner.

OFFICE OF
THE RAILROAD COMMISSION OF GEORGIA.
ATLANTA, GA., August 2, 1898.

IN RE COMPLAINT AGAINST THE WESTERN UNION TELEGRAPH COMPANY FOR OVERCHARGE IN DEMANDING OF THE SENDERS OF TELEGRAPHIC DISPATCHES THAT THEY ATTACH AND CANCEL THE REQUISITE REVENUE STAMPS BEFORE RECEIVING THE SAME FOR TRANSMISSION.

On motion of Commissioner Crenshaw, it is ordered: That the report and opinion this day filed by Commissioner Atkinson, to whom the above entitled matter was referred, be adopted as the opinion and judgment of the Commission, and it is thereupon further ordered: That the rule in said matter issued be and the same is hereby discharged.

By order of the Board:

L. N. TRAMMELL,
Chairman.

J. D. MASSEY,
Secretary.

Statement of the Case.

AMERICAN EXPRESS COMPANY *v.* MICHIGAN.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 220. Argued November 9, 1899. — Decided April 16, 1900.

A proceeding for a mandamus is "a suit" within the meaning of that term as employed in Rev. Stat. § 709.

A Federal question, which was decided in the court below, is involved in this suit.

The statute of June 13, 1898, c. 448, "to meet war expenditures, and for other purposes," does not forbid an express company, upon which is imposed the duty of paying a tax upon express matter, from requiring the shipper to furnish the stamp, or the means of paying for it.

THE Attorney General of the State of Michigan on the relation of George F. Moore and others commenced proceedings in the Circuit Court of Wayne County, Michigan, against the American Express Company. The company was described as "a joint stock association organized and existing under the laws of the State of New York and having its principal business office located in the city of New York, in said State." It was averred that the company complied with the requirements of certain statutes of the State of Michigan and had obtained the necessary certificate authorizing it to carry on an express business in that State, and in order to conduct such business had a large number of agents and offices in the State. The petition then alleged that on June 13, 1898, the Congress of the United States passed an act commonly designated as the War Revenue Act, by which it was made the duty of express companies on receiving a package for carriage to issue a receipt for such package, and providing that the receipt thus issued should bear a one cent stamp. After referring to the text of the act of Congress on the above subject, it was alleged that by the provisions of the law in question the primary and absolute duty was imposed upon express companies to provide the receipt and to affix and cancel the one cent stamp as required by law. The following averments were then made:

"That by reason of a desire of the respondent (the express company) to avoid the payment of the stamp tax, so called, and to impose such obligation on the shipper, the respondent

herein refuses to accept any goods for transportation unless such shipper attaches the stamp to the said bill of lading, manifest or other evidence of receipt and forwarding for each shipment, or furnishes the money or means for that purpose to the said company, and that the said company thereby not only avoids its duty under said act of Congress to pay and bear its proportion of the revenues to meet war expenditures as provided by said act, but violates its duty as a common carrier to receive, accept and deliver such goods, wares and merchandise so offered and tendered to it for that purpose."

A number of instances were specified where it was averred the express company on the tender to it of packages for transportation as a common carrier had refused to receive the same and to issue receipts therefor "unless a stamp of the value of one cent was paid or provided" by the shipper. It was charged that the conduct of the express company was in violation of the obligations imposed upon it by the act of Congress in question, and constituted a refusal to perform its duty as a common carrier. The prayer was for a mandamus commanding the company to receive packages for transportation by express and issue a receipt with stamp duly canceled thereon, without seeking to compel shippers who might tender packages for carriage either to pay for the one cent stamp or to provide the means for so doing.

The answer of the express company admitted that it required persons who tendered packages for carriage, by express, either to pay or provide the means for defraying the cost of the one cent stamp, but denied that its conduct in so doing was a violation of the act of Congress by which the one cent tax on express receipts was imposed. On the contrary, it was averred that the act of Congress, when properly construed, although imposing the absolute duty to issue a receipt for every package as therein provided, left the question of who should pay for the stamp free for adjustment between the shipper and the express company. By the act of Congress, it was asserted, the express company had, therefore, the right or privilege of insisting that those who offered packages to be carried by express should either furnish the one cent stamp or provide the means of pay-

ing for it. It was, moreover, alleged that the company had in effect but increased its rates on each shipment by adding to the previous rates the sum of the stamp tax. And it was averred that this increase the company was not forbidden to make, by the act of Congress imposing the one cent stamp tax, and that the rate as increased by exacting that the one cent stamp should be furnished or that its value be paid for by the shipper was just and reasonable, and was not in conflict with the act of Congress. The answer was in effect demurred to as not stating a defence. The case was submitted for decision on petition and answer. The court ordered the mandamus to issue substantially as prayed for. The cause was then removed by writ of *certiorari* to the Supreme Court of the State of Michigan, where the judgment of the trial court was affirmed. 77 Northwestern Rep. 317. By an allowance of a writ of error the judgment of the Supreme Court of the State is before us for review.

Mr. Lewis Cass Ledyard for plaintiff in error.

Mr. C. E. Warner for defendants in error.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

We will first dispose of the claim that this court is without jurisdiction to review the judgment, and that hence the writ of error should be dismissed. The contention is based upon the following: 1, that the proceeding below, being for a mandamus, was not a "suit" within the meaning of that term as employed in section 709 of the Revised Statutes; and 2, because no Federal question is involved and no such question was below decided.

The first proposition is not tenable. *McPherson* v. *Blacker*, 146 U. S. 1, 24; *Hartman* v. *Greenough*, 102 U. S. 672.

The second is likewise without merit. From the summary of the pleadings just made, in the statement of the case, it is apparent that the issue between the parties involved an assertion on the one side that the act of Congress imposed on the express company the absolute duty of furnishing the receipt, of

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affixing the stamp thereto and canceling the same. The argument that it was hence a violation of the duty, imposed upon the express company by the act of Congress, for the company either to demand the stamp or the amount thereof from the shipper, and that it was also a violation of the act of Congress for the express company to increase its rates to the extent necessary to accomplish the result of securing the reimbursement of the amount of the one cent stamp tax. On the other hand, the defence of the express company was that under the act of Congress it had the right, privilege or immunity (which it specially set up and claimed) of demanding the payment of the one cent or of increasing its rates to the extent that the tax imposed a burden upon it, provided only the rates charged were just and reasonable. The question thus presented was in substance the only one decided by the Supreme Court of the State. In stating the issues arising for its decision the court said: "The main question in the case relates to the construction to be placed upon the act in question," that is, the act of Congress. After a review of the provisions of the statute it was decided that under it the express company could not in any event or by any means transfer the burden of the tax in question. Considering the right of the express company to increase its rates to the extent necessary to secure the payment of the tax by the shipper, the court said:

"It is contended, however, that the company has the right to make new regulations and establish new rates to meet all this burden. It is contended that the effect of this is to throw the burden upon the shipper. It is apparent upon the face of this proceeding that the very purpose of this change in the regulations and the increase of rates is to avoid the payment of the tax and thus cast upon the shipper the burden which the act of Congress puts upon the company. This is but an evasion and a subterfuge to avoid the terms of the act."

The foregoing reasoning was supplemented by comment upon the fact that the increase of rate resulting from the charge of one cent on each package was made without reference to the distance each package was to be carried. We do not, however, understand the remarks on this subject as implying that the

court below decided that the rate as increased by the one cent was intrinsically unreasonable without regard to the provisions of the act of Congress, but only that the rate as so increased was unreasonable, because an attempt on the part of the express company to shift the burden of the tax imposed upon it by the act of Congress, and hence was by legal inference forbidden by that act. No other view is possible when the state of the record is considered. As we have seen, the controversy was submitted on petition and answer. It is nowhere, however, averred in the petition that the rates, with or without the addition of the tax, were intrinsically unjust and unreasonable; while in the answer, following an averment as to the enactment of the stamp act and its resulting effects, it was averred as follows:

"Respondent therefore decided to raise and did raise its rates of transportation to an amount reasonable and just, and only necessary to meet the change of conditions made by said act, and save itself from great loss of revenue and profits as compared with its earnings before the passage of said act.

"And respondent submits and asserts that it had the full and perfect right to make such change in its method of transacting its business and in its former rates for transportation."

As, therefore, upon the submission of the cause upon the pleadings, there was no controversy as to the intrinsic reasonableness of the increased rates, it follows that if we were to hold that the court below had decided that the increased rates were unreasonable in themselves, we would conclude that the court below had so held, although it was substantially admitted on the record by both parties that the increase of rates was just and reasonable, if not forbidden by the act of Congress. But such action cannot be attributed consistently with reason and justice. This being the state of the case, the Federal question presented is wholly unaffected by what was said by the court on the subject of the right of the corporation to increase its charges by the amount of the tax. As there was no allegation that the rates existing prior to the imposition of the one cent stamp tax were unreasonable, it would follow that the rates which were otherwise reasonable were decided not to be so solely because there was added to the charge for each pack-

age the exact amount of the increased cost for transporting the package, occasioned as to each package, by the specific imposition on each by the act of Congress of the one cent stamp tax. But to cause rates which were conceded to be reasonable to become unreasonable because alone of such increased charge the assumption must be made that the act of Congress not only imposed the burden of the tax solely on the express company, but also forbade its shifting the same by any and every method. And no other view is, in reason, possible when the averments of the answer are borne in mind. It hence results that the Federal question, although changed in form of statement, remains in substance the same. In the changed form it is as follows: Did the act of Congress deprive the express company of the right to shift the burden of the tax by increasing the rate by the exact amount distinctly and separately imposed by the act upon each shipment, and hence render the charge unreasonable, which would be in itself reasonable, except for the hypothesis that the act of Congress renders all efforts to shift the tax illegal.

It follows that the case as made by the pleadings, and which was decided below, involved a right, privilege or immunity under the act of Congress, which was specially set up and claimed by the express company, to contract with the shippers for the payment of the tax provided by the act of Congress, or to increase its rate, within the limit of reasonableness, to the extent of such tax, which right, privilege or immunity was denied and held to be without merit by the court below. There is therefore jurisdiction. Rev. Stat. § 709.

The controversy which is contained in the merits of the cause is resolvable into three questions: First. Does the act of Congress impose upon the express company the duty of making a receipt for a package tendered to it, and does it also forbid the express company from requiring the shipper to furnish the stamp to be affixed to the receipt, or of supplying the means of paying for the same? Second. If the act of Congress does impose such duty on the express company and does inhibit it from requiring that the shipper furnish the stamp or the means of paying for it, does the act further forbid the express com-

pany from seeking to cast the burden on the shipper by an increase of rates? Third. And, as a corollary of the second proposition, does an increase of rate by an express company which is otherwise just and reasonable become unlawful, under the act of Congress, because such increase is made with the purpose of shifting the burden of the one cent tax from its own shoulders to that of the shipper?

The first proposition is unnecessary to be considered, since even although it be conceded that the act of Congress imposes on the express company the duty of paying the one cent stamp tax, this admission would not be at all decisive of the cause unless also it be ascertained under the second proposition, that the act of Congress also forbids the express company from shifting the burden of the tax by means of an increase of rates. And no necessity for passing on the first proposition arises from the mere fact that the decision of the second proposition requires a consideration of the provisions of the statute which it would be necessary to take into view if the first proposition was under consideration.

It is also to be observed that the second and third propositions which involve, the one the right to shift the burden of the tax by exacting that the one cent be provided and the other the power to increase rates within the limits of the requirement that the charges as increased be reasonable, both depend upon the same considerations.

Indeed, the question into which all the issues are ultimately resolvable is whether the right exists to shift the burden, of course ever circumscribed by the duty of not exceeding reasonable rates. If it does not, that is, upon the hypothesis that it not only can be, but is forbidden, then it must result that all methods adopted to attain the prohibited result are void. On the contrary, if the right to seek to shift the burden obtains then the substantial result of what is done becomes the criterion, and the mere fact that the motive, announced, for a reasonable increase of rates, is declared to be a shifting of the burden, cannot prevent the exercise of the lawful right.

The special provisions of the law upon which the case turns are the first paragraph of section 6 and the express and freight

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clause of Schedule A, forming a part of section 25. 30 Stat. 451, 459.

The paragraph of section 6 referred to is as follows:

"SEC. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule."

Now, there is nothing in the provisions just quoted which, by the widest conjecture, can be construed as expressly forbidding the person upon whom the taxes are cast from shifting the same by contract or by any other lawful means. An inference to the contrary arises from the fact that the duty is imposed in the alternative on "any person or persons, or party, who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued."

The language of the express and freight clause of Schedule A is as follows:

"EXPRESS AND FREIGHT: It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation, or person whose occupation is to act as such, to issue to the shipper or consignor or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached and cancelled, as is in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: *Provided*, That but one bill of lading

shall be required on bundles or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest, or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier, express company, or corporation or person to a penalty of fifty dollars for each offence, and no such bill of lading, manifest, or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid."

The argument is that as it is made the duty of the express company to make and issue "a bill of lading, manifest or other evidence of receipt and forwarding for each shipment, . . . and there shall be duly attached and cancelled, as in this act provided, to each of said bills of lading, manifests or other memorandum, and to each duplicate thereof, a stamp of the value of one cent;" therefore, the obligation is imposed absolutely on the express company, not only to make and furnish the receipt, but to issue it with the stamp duly cancelled. But as we have said though the correctness of the claim be *arguendo* taken for granted, such concession does not suffice to dispose of the essential issues. They are that by the statute the express company is forbidden from shifting the burden by an increase of rates, although such increased rates be in themselves reasonable. As no express provisions sustaining the propositions are found in the law, they must rest solely upon the general assumption that because it is concluded that the law has cast upon the express company the duty of paying the one cent stamp tax, there is hence to be implied a prohibition restraining the express company from shifting the burden by means of an increase of rates within the limits of what is reasonable. In other words, the contention comes to this, that the act in question is not alone a law levying taxes and providing the means for collecting them, but is moreover a statute determining that the burden must irrevocably continue to be upon the one on whom it is primarily placed. The result follows that all contracts or acts shifting the burden, and which would be otherwise valid, become void. To add by implication such a provision to a tax law would be contrary to its intent, and be in conflict with the general object which a law levying taxes

is naturally presumed to effectuate. Indeed, it seems almost impossible to suppose that a purpose of such a character could have been contemplated, as the widest conjecture would not be adequate to foreshadow the far reaching consequences which would ensue from it. To declare upon what person or property all taxes must primarily fall is a usual purpose of a law levying taxes. To say when and how the ultimate burden of a tax shall be distributed among all the members of society would necessitate taking into view every possible contract which can be made, and would compel the weighing of the final influence of every conceivable dealing between man and man. A tax rests upon real estate. Can it be said that by the law imposing such a tax it was intended to prevent the owner of real property from taking into consideration the amount of a tax thereon, in determining the rent which is to be exacted by him? A tax is imposed upon stock in trade. Must it be held that the purpose of such a law is to regulate the price at which the goods shall be sold, and restrain the merchant therefore from distributing the sum of the tax in the price charged for his merchandise? As the means by which the burdens of taxes may be shifted are as multiform and as various as is the power to contract itself, it follows that the argument relied on if adopted would control almost every conceivable form of contract and render them void if they had the result stated. Thus, the price of all property, the result of all production, the sum of all wages, would be controlled irrevocably by a law levying taxes, if such a law forbade a shifting of the burden of the tax and avoided all acts which brought about that result. It cannot be doubted that to adopt, by implication, the view pressed upon us, would be to virtually destroy all freedom of contract, and in its final analyses would deny the existence of all rights of property. And this becomes more especially demonstrable when the nature of a stamp tax is taken into consideration. A stamp duty is embraced within the purview of those taxes which are denominated indirect, and one of the natural characteristics of which is, although it may not be essential, that they are susceptible of being shifted from the person upon whom in the first instance the duty of

payment is laid. We are thus invoked by construction to add to the statute a provision forbidding all attempts to shift the burden of the stamp tax when the nature of the indirect taxation which the statute creates suggests a contrary inference. And, in this connection, although we have already called attention to the consequences which must generally result from the application of the doctrine contended for, it will not be inappropriate to refer to certain of the provisions of the act now under consideration, which more aptly serve to make particularly manifest the consequences indicated. Thus, perfumery, patent medicines and many other articles are required by the statute to be stamped by the owner before sale. The logical result of the doctrine referred to would be that the price of the articles so made amenable to a stamp tax could not be increased, so as to shift the cost of the stamp upon the consumer. Yet it is apparent that such a construction of the statute would be both unnatural and strained.

The argument is not strengthened by the contention that as the law has imposed the stamp tax on the carrier, public policy forbids that the carrier should be allowed to escape his share of the public burdens by shifting the tax to others who are presumed to have discharged their due share of taxes. This argument of public policy if applied to a carrier would be equally applicable to all the other stamp taxes which the law imposes. Nor is the fact that the express company is a common carrier and engaged in a business in which the public has an interest and which is subject to regulation, of importance in determining the correctness of the proposition relied upon. The mere fact that the stamp duty is imposed upon a common carrier does not divest such tax of one of its usual characteristics or justly imply that the carrier is in consequence of the law deprived of its lawful right to fix reasonable rates. Unquestionably a carrier is subject to the requirement of reasonable rates, but as we have seen, no question of the intrinsic unreasonableness of the rates charged arises on this record or is at issue in this cause. As previously pointed out, to decide as a matter of law that rates are essentially unreasonable from the mere fact that their enforcement will operate to shift the

burden of a stamp tax would be in effect but to hold that the act of Congress by the mere fact of imposing a stamp tax forbids all attempts to shift it, and consequently that the carrier is deprived by the law of the right to fix rates, even although the limit of reasonable rates be not transcended. This reduces the contention back to the unsound proposition which we have already examined and disposed of.

There is a special provision of the law which grants affirmatively the right to add the tax to the cost of an instrument, and hence it is urged this express authority in one case is pregnant with the denial of a right to do so in other cases. The clause in the statute referred to is found in a paragraph of Schedule A, whereby a stamp tax is imposed on "Bill of exchange, (inland,) draft, certificate of deposit drawing interest or order for the payment of any sum of money. . . ."

The second and concluding sentence of the paragraph reads as follows:

"And from and after the first day of July, eighteen hundred and ninety-eight, the provisions of this paragraph shall apply as well to original domestic money orders issued by the government of the United States, and the price of such money orders shall be increased by a sum equal to the value of the stamps herein provided for."

Without the provision last quoted, authority would have been wanting to increase the cost of a government money order, by adding the sum of the tax imposed upon such order to the charge therefor, because the charge for a money order was fixed by law. This at once explains the necessity for conferring authority to add to the cost of the money order the amount of the stamp tax. Instead, therefore, of giving rise to the suggestion that the right to shift the burden of other stamp taxes was taken away in all cases where there was liberty and power to contract, the provision relied on is persuasive to the contrary. For, clearly, the express authority conferred to do that which the law otherwise forbade in consequence of the want of power in a government official, cannot with reason be held to imply a prohibition against doing that which was not forbidden by law. The argument, in effect, amounts to this and nothing more;

that, because it was imperatively necessary to confer a power upon a government officer which, owing to statutory restriction, he otherwise would not have possessed, therefore the legal deduction must be drawn that freedom of contract as between those who had the right to contract was destroyed.

But it is asserted that the War Revenue Act of 1898 was modelled upon the act of July 1, 1862, providing internal revenue tax, 12 Stat. 432, and as the act of 1862 plainly manifested the purpose of Congress to impose a stamp tax on express companies and to forbid them from shifting the burden arising from such tax, therefore the act under consideration should be construed as having the same effect. The fact that the present act was modelled upon the act of 1862 is undoubted, (see section 94 of the act of 1862, 12 Stat. 475,) but the text of the act of 1862 expressed no restraint upon the power of shifting by contract or by an increase of rates within the limit of the requirement that they should be reasonable. It follows that testing the present act by that of 1862 throws no additional light upon the controversy. The claim that the act of 1862 contained a prohibition against shifting is thus inferred. By the act of 1862 a stated per centum of tax was imposed upon the gross receipts of railroads, steamboats and ferryboats, as well as toll bridges. (Section 80, 12 Stat. 468.) After providing for the levy and collection of the taxes in question, the following proviso was applied to the section by which the taxes just referred to were levied: "*Provided*, That all such persons, companies and corporations shall have the right to add the duty or tax imposed hereby to their rates of fare whenever their liability thereto may commence, any limitations which may exist by law or by agreement with any person or company which may have paid or be liable to pay such fare to the contrary notwithstanding."

This express authority to shift the burden of the tax on gross receipts, it is claimed under the rule of *inclusio unius*, justifies the implication that the power to shift did not exist as to taxes imposed by other portions of the act of 1862, to which the proviso did not apply.

In passing it is worthy of remark that by the act of March 3,

1863, 12 Stat. 713, it was enacted (sec. 10) that on and after the 1st day of April, 1863, "any person or persons, firms, companies or corporations, carrying on an express business shall, in lieu of the tax and stamp duties imposed by existing laws, be subject to pay a duty of two per centum on the gross amount of all the receipts of such express business, and shall be subject to the same provisions, rules, and penalties as are prescribed in section 80 of the act to which this is an amendment." In other words, when in 1863 the stamp tax relating to express companies was abrogated and a tax on gross receipts substituted therefor, the express companies were authorized to add the result of the gross receipt tax to their charges, any law or contract to the contrary. But the implication deduced from the authority conferred by the statute of 1862 to shift the burden of the tax on gross receipts levied on railroads, etc., by an increase of charges, is unsound. Indeed, the proviso in question, when properly construed, gives rise to an inference contrary to the one sought to be drawn from it.

The tax imposed under the section in question was not in form a stamp tax, but on gross receipts, and the proviso referred to may, from abundance of caution, have been inserted to leave no room for the assumption that a tax thereby imposed was a direct tax and not subject to be shifted. Besides, the whole context manifests the purpose not to declare a rule in violation of public policy as to particular corporations, but to enable such corporations to possess the power to shift the tax by increasing its charges, even although contracts or restrictions previously imposed might otherwise prevent.

The right to shift by an increase of rates within what is reasonable can only be held to be illegal upon the assumption that public policy forbids it. If such be taken to have been the principle of public policy embodied in the act of 1862, that act must be held to have repudiated, by the proviso to section 80, the very public policy by the light of which it is contended the act must be interpreted. If there was a rule of public policy giving rise to the assumption that stamp taxes relating to express companies could not be shifted, it becomes impossible in reason to understand why, when the taxation was changed

by the act of 1863 from a stamp tax to one on gross receipts, the express companies should have been brought within the proviso to section 80 of the act of 1862. Clearly, if the rule of public policy which is relied on existed it would have been as cogently applicable to the one form of tax as to the other.

In the case of the *State Freight Tax*, 15 Wall. 232, the court was called upon to notice a state law conferring a right to charge over by an increase of rates the sum of tax imposed. In considering the subject (pp. 273, 274) it was said:

"The provision is as follows: 'Corporations whose lines of improvement are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tolls, and to collect the same therewith.' Evidently this contemplates a liability for the tax beyond that of the company required to pay into the treasury, and it authorizes the burden to be laid upon the freight carried, in exemption of the corporation owning the roadway. It carries the tax over and beyond the carrier to the thing carried. Improvement companies, not themselves authorized to act as carriers, but having only power to construct and maintain roadways, charging tolls for the use thereof, are generally limited by their charters in the rates of toll they are allowed to charge. Hence the right to increase the tolls to the extent of the tax was given them in order that the tax might come from the freight transported, and not from the treasury of the companies. It required no such grant to companies which not only own their roadway, but have the right to transport thereon. Though the tolls they may exact are limited, their charges for carriage are not. They can, therefore, add the tax to the charge for transportation without further authority."

Other contentions as to the construction of the act based upon various other provisions have been pressed with great earnestness, but we deem it unnecessary to consider them, as the foregoing considerations dispose of the case. It follows that the court below erred in holding that by the act of Congress the express company was forbidden from shifting the burden of the stamp tax by an increase of rates which were not in themselves unreasonable.

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Counsel for Parties.

The judgment below rendered must, therefore, be reversed, and the case be remanded for further proceedings not inconsistent with this opinion, and it is so ordered.

MR. JUSTICE HARLAN and MR. JUSTICE MCKENNA dissenting.

We are of opinion that the act of Congress imposed upon the Express Company the duty not only of affixing at its own expence the required stamp upon any receipt issued by it to a shipper, but of cancelling such stamp — thus giving to the shipper a receipt that could, when necessary, be used as evidence. Whether the company, having issued a receipt duly stamped and cancelled, could increase its charges against the shipper for the purpose, whether avowed or not, of meeting this additional expense, is not, in our opinion, a Federal question, and upon that point this court need not express an opinion.